CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 328

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

DOUBLE MATERIALS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for writ of certiorari filed October 11, 1944
Certiorari granted November 20, 1944

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626804—45

DOCKET ENTRIES.

COURT HOLDING COMPANY, a Florida Corporation,
Petitioner,

versus Docket No. 111075.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:
For Taxpayer: Maurice Kay, Esq.,
For Comm'r: R. C. Whitley, Esq., F. L. Van Haaften, Esq.

1942
May 18—Petition received and filed. Taxpayer notified. Fee paid.
May 19—Copy of petition served on General Counsel.
June 19—Motion to dismiss (lack of jurisdiction) filed by General Counsel.
June 23—Hearing set June 19, 1942 on motion.
June 24—Hearing set July 8, 1942 on motion. Corrected notice.
June 26—Notice of the appearance of Maurice Kay as counsel filed.
June 29—Motion to amend petition embodying amendment, filed by taxpayer. 6-30-42 Copy served on General Counsel.
July 8—Hearing had before Mr. Murdock on respondent's motion to dismiss continued—(motion to amend petition objected to as not properly executed).
July 8—Order continuing proceeding to 7-29-42 entered.
July 16—Amended petition filed by taxpayer.

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July 17—Copy of amended petition served on General Counsel.

July 29—Hearing had before Mr. Murdock on motion of respondent to dismiss. (Amended petition) Denied. Usual time to answer.

July 29—Order that motion to dismiss be denied, and respondent is allowed 60 days to answer or 45 days to move entered.

Sept. 23—Answer filed by General Counsel.

Oct. 2—Notice issued placing proceeding on Washington, D. C. calendar. Service of answer and request made.

Oct. 19—Request for hearing in Miami, Fla., filed by taxpayer. 10-24-42 Granted.

Nov. 9—Reply to answer filed by taxpayer. 11-9-42 Copy served on General Counsel.

Dec. 7—Hearing set 1-18-43, Miami, Fla.

Dec. 17—Application for order to take depositions of Abe C. Fine and Margaret W. Fine filed by General Counsel.

Dec. 21—Answer in opposition to application for order to take depositions filed by taxpayer.

Dec. 23—Order that the application of counsel for the respondent to take depositions is denied, entered.

Dec. 23—Application for subpoena duces tecum to Regina Feiwish filed by General Counsel. Subpoena issued.

1943

Jan. 21—Hearing had before Judge Disney on the merits. Submitted. Briefs due 3-10-43. Replies 3-25-43.

Feb. 8—Transcript of hearing 1-21-43 filed.

Mar. 10—Brief filed by taxpayer.

Mar. 10—Brief filed by General Counsel. Served 3-11-43.

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Mar. 11—Copy of brief served on General Counsel.

Mar. 25—Reply brief filed by taxpayer. 3-25-43 Copy served on General Counsel.

Aug. 9—Findings of fact and opinion rendered, Disney, Judge, Div. 4. Decision will be entered under Rule 50. 8-9-43 Copy served.

Aug. 25—Motion to reconsider findings of fact and opinion filed by taxpayer. 8-27-43 Denied.

Sept. 21—Computation of deficiency filed by General Counsel.

Sept. 23—Hearing set Oct. 13, 1943 on settlement.

Oct. 9—Consent to settlement filed by taxpayer.

Oct. 12—Decision entered, Disney, Judge, Div. 4.

Dec. 13—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Dec. 13—Proof of service filed by taxpayer.

Dec. 13—Praecipe filed by taxpayer, proof of service thereon.

1944

Jan. 28—Agreed statement of evidence lodged.

Jan. 29—Agreed statement of evidence approved and ordered filed.

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3 AMENDED PETITION.

Filed Jul. 16, 1942.

United States Board of Tax Appeals.

Court Holding Company, a Florida Corporation, Petitioner,

vs. Docket No. 111075.

Commissioner of Internal Revenue, Respondent.

The jurisdiction to hear this petition is conferred upon the Board of Tax Appeals by Section 1101, Chapter 5, Internal Revenue Code.

The above named Petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:R:EEB; 90D, dated March 23, 1942, copy of which is attachd hereto, marked Exhibit "A", and as a basis for his proceedings alleges as follows:

1. The Petitioner ceased all activities on February 24, 1940 and then and there abandoned its charter under which it had been incorporated under the laws of Florida, such abandonment effected immediate voluntary dissolution of the corporation for all purposes except that for the sole purpose of winding up its affairs, its life being continued for the period of three years under the laws of Florida. Compiled General Laws of Florida, Art. 13, Par. 6571.

2. The notice of deficiency was mailed to Petitioner February 27, 1942.

3. The taxes in controversy are income taxes in the amount of $3,601.87 and excess profits taxes in the amount of $2,509.18 together with penalties in the amount of $4,-254.29 for the taxable years ended December 31, 1938, 1939 and 1940.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

Taxable Year Ended December 31, 1938.

(a) The Respondent erred in disallowing the sum of $727.85 from the amount claimed for depreciation.

Taxable Year Ended December 31, 1939.

(b) The Respondent erred in disallowing the sum of $511.54 from the amount claimed for depreciation.

(c) The Respondent erred in disallowing an item of $350.00 representing rent discount.

Taxable Year Ended December 31, 1940.

(d) The Respondent erred in disallowing the sum of $228.21 as depreciation.

(e) The Respondent erred in determining that the corporation realized a profit on the sale of real estate in the amount of $23,982.07.

(f) The Respondent erred in charging the 50% fraud penalty and the 25% delinquency penalty.

The Petitioner alleges in support of the assignments of errors the following:

Taxable Year Ended December 31, 1938.

(a) The Building was constructed in 1925. It is a three story building, ordinary concrete block construction, the life of the property at the time of its completion was only 25 years. The property was acquired in 1934 and the maximum life of the building at the time of its acquisition was not more than fifteen years. The furniture and floor coverings in the building which were acquired at the same time the building was taken over had a life of only five years. The refrigerators were purchased in 1937 at a cost of $1,670.00. The life of this equipment is only ten years.

Taxable Year Ended December 31, 1939.

The petitioner alleges in support of assignment of errors (b) and (c) above the following:

(b) The reasons set forth respecting depreciation for the year 1938, paragraph (a) are equally applicable to the year 1939 and should be considered for said year 1939 as if set forth herein.

(c) Under the terms of the lease this property was rented for $8,500.00 per annum. The full amount of rent was included in the income for the year in question. Of the total rent, $3,500.00 was paid by way of notes. On June 13, 1939, a discount of ten per centum on the face value of the notes or $350.00 was allowed the maker of the notes as a rent discount. Since the total amount of $8,500.00 was returned as income, the item of $350.00 representing rent discount which was not received is clearly deductible.

Taxable Year Ended December 31, 1940.

The Petitioner alleges in support of assignment of errors (d), (e) and (f) above the following:

(d) The property was deeded by the Petitioner to the stockholders as a liquidating dividend on February 24, 1940, and accordingly Petitioner is entitled to depreciation on its assets from January 1, to February 23, 1940, inclusive.

(e) The Board of Directors of the Court Holding Company at a meeting called on February 23, 1940, passed a resolution declaring a dividend, payable in kind, in complete liquidation and surrender of all the outstanding corporate stock of the corporation. The officers of the cor-

poration were also empowered and authorized to execute all the necessary papers for the purpose of carrying out the resolution.

The stockholders of the Court Holding Company on February 23, 1940, at a meeting called for the purpose of acting on the recommendation of the Board of Directors, passed a resolution ratifying, confirming and approving the resolution of the Board of Directors. That the directors pursuant to the authority conferred upon them by the resolution, deeded the property on February 24, 1940, to Louis Miller and Minnie Miller.

(f) The property formerly owned by the corporation but transferred to Louis Miller and Minnie Miller in liquidation of its stock was sold by Louis Miller and Minnie Miller in their individual capacity on April 8, 1940. Therefore, the corporation, having declared and paid the liquidating dividend before the property was sold, and not with any intention to evade taxes, was acting in good faith and within the law and was not required to return as income any profit which inured to the benefit of the former stockholders of the Company. Consequently, there could not be any question of fraud involved.

Wherefore this Petitioner prays this Board may hear this proceeding and

1. That the Board determine that the Respondent erred in disallowing the sum of $727.85 from the amount claimed for depreciation for the year ended December 31, 1938.

2. That the Board determine that the Respondent erred in disallowing the sum of $511.54 from the amount claimed for depreciation for the year ended December 31, 1939.

3. That the Respondent erred in disallowing an item of $350.00 representing rent discount for the year ending December 31, 1939.

4. That the Respondent erred in disallowing the sum $228.21 as depreciation for the period January 1, to February 23, 1940.

5. That the Respondent erred in determining that the corporation realized a profit on the sale of the real estate in the amount of $23,982.07, and

6. That the Respondent erred in charging the Petitioner with fraud and assessing the 50% fraud penalty and the 25% delinquency penalty.

MAURICE KAY,
(Maurice Kay)
Attorney for Petitioner.

Investment Building,
Washington, D. C.

State of Florida,
County of Dade, ss.

Louis Miller and Harry A. Miller, having been first duly sworn according to law depose and say that they were directors and President and Secretary, respectively of the Court Holding Company, a Florida Corporation, the Petitioner named in the above named petition; that they were authorized by the directors of the corporation to act as trustees for said corporation during the dissolution of the corporation and that as trustees they are duly authorized and empowered to verify the above petition; that they have read the foregoing petition and are familiar with the statements of fact contained therein and that the facts stated therein are true.

LOUIS MILLER,
(Louis Miller)
HARRY A. MILLER.
(Harry Miller)

Subscribed and sworn to before me this 11 day of July, 1942.

MILFORD BROTMAN,
Notary Public, State of Florida at large.

(Seal)

My commission expires May 14, 1945.

Treasury Department

Internal Revenue Service

Jacksonville, Fla.

February 27, 1942.

Court Holding Company,
1144—Ocean Drive,
Miami Beach, Florida.

Sirs:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938, 1938 and 1940 discloses a deficiency of $3,601.87 and that the determination of your excess-profits tax liability for the years mentioned discloses a deficiency of $2,509.18, together with penalties of $4,254.29, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 30th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Jacksonville, Florida, for the attention of IT:R:EEB. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

(Sgd.) By M. O. ELLIS,
Internal Revenue Agent.

Enclosures:
Statement
Form of waiver.

STATEMENT.

IT:R:EEB 90D.
LS.

Court Holding Company,
1144 Ocean Drive,
Miami Beach, Florida.

Tax Liability for the Taxable Years Ended December 31, 1938, 1939 and 1940.

Income Tax.

Year	Liability	Assessed	Deficiency
1938	$ 200.70	None	$ 200.70
1939	254.97	None	254.97

1940	3,146.20	None	3,146.20
Total	$3,601.87	None	$3,601.87

Delinquency penalties for 1939 and 1940..... 799.30

50% Fraud penalty for 1940 ..... 1,573.10

Excess Profits Tax.

Year	Liability	Assessed	Deficiency
1938	None	None	None
1939	None	None	None
1940	$2,509.18	None	$2,509.18
Total	$2,509.18	None	$2,509.18

25% delinquency penalty 627.30

50% Fraud penalty $1,254.59

Inasmuch as you failed to file income tax returns for the years ended December 31, 1939, and December 31, 1940, within the time prescribed by law, the delinquency penalty has been asserted in accordance with the provisions of Section 291 of the Revenue Act of 1938.

The 50% fraud penalty shown herein for the taxable year ended December 31, 1940, has been asserted in accordance with the provisions of Section 293 of the Revenue Act of 1938.

Taxable Year Ended December 31, 1938.

Adjustments to Net Income.

Net income reported on return (Loss)..... ($ 177.88)

Unallowable deductions and additional income:

(a) Book Income	$1,055.66	
(b) Depreciation	727.85	1,783.51
Net income adjusted		$1,605.63

Explanation of Adjustments.

(a) The books as recently written reflect a profit of $877.78, resulting in additional income over and above the amount reported on the original return filed of $1,055.66.

(b) Depreciation of $2,376.91 reflected on the books is determined to be excessive and has been disallowed in the amount of $727.85.

Computation of Tax.

Excess Profits Tax:	
Taxable net income	$1,605.63
Less: 10% of $20,000.00 value of capital stock as declared in capital stock tax return for the year ended June 30, 1938	2,090.00
Subject to excess profits tax	$ None
Income Tax:	
Taxable net income	$1,605.63
Less excess profits tax	None
Adjusted net income	$1,605.63
Tax at 12½% on $1,605.63	200.70
Less tax previously assessed	None
Deficiency income tax	$ 200.70

Taxable Year Ended December 31, 1939.

Adjustments to Net Income.

Net income reported on return (Loss).....		($ 95.55)
Unallowable deductions and additional income:		
(a) Book income	$1,273.80	
(b) Depreciation	511.54	
(c) Rent discount	350.00	2,135.34
Net income adjusted		$2,039.79

Explanation of Adjustments.

(a) There has been included profit for the year of $1,178.25 as reflected by records, in lieu of loss of $95.55 shown on the original return filed. This results in additional taxable income of $1,273.80 over and above the amount reported.

(b) Deduction claimed on account of depreciation in the amount of $2,176.59 is deemed excessive and has been disallowed in the amount of $511.54.

(c) Rent discount has been disallowed as a deduction.

Computation of Tax.

Excess Profits Tax:	
Taxable net income	$2,039.79
Less: 10% of $22,505.63 value of capital stock as declared in capital stock tax return for the year ended June 30, 1939.....	2,250.56
Subject to excess profits tax	$ None

Income Tax:	
Taxable net income	$2,039.79
Less excess profits tax	None
Adjusted net income	$2,039.79
Tax at 12½% on $2,039.79	254.97
Less: Tax previously assessed, original, account #861157	None
Deficiency income tax	$ 254.97
5% delinquency penalty	$ 12.75

Taxable Year Ended December 31, 1940.

Adjustments to Net Income.

Net income reported on return (Loss)		($1,491.94)
Unallowable deductions and additional income:		
(a) Book income	$ 1,041.44	
(b) Depreciation	228.21	
(c) Profit sale real estate	23,982.07	25,251.72
		$23,759.78
Nontaxable Income and additional deductions:		
(d) Rent	$1,000.00	
(e) Expenses	682.74	1,682.74
Net income adjusted		$22,077.04

Explanation of Adjustments.

(a) Income has been adjusted to the amount reflected on the books.

(b) Depreciation claimed on the books has been disallowed as this is taken into consideration in the computation of profits on sale of real estate.

(c) Profit on sale of Palm Court Apartments has been included as taxable income.

(d) Amounts reflected as rent received during the year have been considered as part of the purchase price of the property sold and taken into consideration in the computation of the profit on the sale of real estate.

(e) Expenses incurred from the agreed sale date to the actual date of transfer have been allowed as a deduction.

Computation of Tax.

Excess-Profits Tax:	
Taxable net income	$22,077.04
Less: 10% of $24,545.42 value of capital stock as declared in capital stock tax return for the year ended June 30, 1940	2,454.54
Subject to excess-profits tax	$19,622.50
Less 5% on declared value	1,227.27
Total Balance	$18,395.23
Tax at 6% on $1,227.27	73.64
Tax at 12% on $18,395.23	2,207.43
Total excess profits tax	$2,281.07
Defense tax	228.11
Total tax	$2,509.18
Less: Tax previously assessed, original, account #853852	None
Total deficiency	$2,509.18

50% fraud penalty	$1,254.59
25% delinquency penalty	627.30
Income Tax:	
Taxable net income	$22,077.04
Less excess profits tax	2,509.18
Net income adjusted	$19,567.86
Tax at 13½% on $5,000.00	675.00
Tax at 15% on $14,567.86	2,185.18
Total income tax	$2,860.18
Defense tax	286.02
Total tax assessable	$3,146.20
Less: Tax previously assessed original, account #853852	None
Deficiency income tax	$3,146.20
50% fraud penalty	$1,573.10
25% delinquency penalty	$ 786.55

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16 ANSWER.

Received Sep. 23, 1942.

Filed Sep. 23, 1942.

(Title Omitted.)

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits, denies and avers as follows:

1. Denies the allegations contained in paragraph 1 of the amended petition.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the amended petition:

4 (a) to (f), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (f), inclusive, of paragraph 4 of the amended petition.

Allegations of Fact Commencing on Page 3 of the Amended Petition.

(a) Admits that the property was acquired by petitioner in 1934, but denies the remainder of subparagraph (a) of the facts alleged for the year ended December 31, 1938.

(b) and (c). Denies the allegations of fact contained in subparagraphs (b) and (c) alleged for the year ended December 31, 1939.

(d), (e) and (f). Denies the allegations of fact contained in subparagraphs (d), (e) and (f) alleged for the year ended December 31, 1940.

5. Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

For further answer the respondent alleges:

6. That the petitioner is liable for the penalty for failure to make and file a return for income tax for the tax-

able year 1939 within the time prescribed by law as set forth in Section 291 of the Internal Revenue Code.

7. That the petitioner is liable for the penalty for failure to make and file a return for both income and excess-profits taxes for the taxable year 1940 within the time prescribed by law as set forth in Section 291 of the Internal Revenue Code.

8. That the petitioner is liable to the 50% evasion penalty as prescribed in Section 293 of the Internal Revenue Code in connection with its liability for income and excess-profits taxes for the calendar year 1940.

The respondent relies upon the following facts and alleges:

9. That the petitioner failed to make and file an income and excess-profits tax return within the time prescribed by law for the calendar year 1939.

10. That such failure was not due to reasonable cause.

11. That the petitioner failed to make and file an income and excess-profits tax return within the time prescribed by law for the calendar year 1940.

12. That such failure was not due to reasonable cause.

13. That the petitioner with intent to evade tax filed a Federal income and excess-profits tax return for the calendar year 1940 disclosing a net loss of $1,491.94, whereas its correct net income for said year was $22,077.04.

14. That petitioner with intent to evade tax fraudulently failed to report on its tax return for the year 1940

profit on the disposition of real estate in the amount of $23,982.07.

15. That by reason of the failure of the petitioner to report its correct income for the calendar year 1940 there is due from this petitioner deficiencies in tax and penalty as set forth in the notice of deficiency and a part of the deficiency is due to fraud with intent to evade tax.

Wherefore, it is prayed that the appeal be denied and the deficiencies and penalties set forth in the notice of deficiency be in all respects approved.

(Signed) J. P. WENCHEL, FVH
(J. P. Wenchel)
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
FRANK M. THOMPSON, JR.,
Division Counsel.
F. L. VAN HAAFTEN,
Special Attorney,
Bureau of Internal Revenue.

aw 9-21-42.

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19 REPLY.

Filed Nov. 9, 1942.

(Title Omitted.)

Comes now the Court Holding Company, by its attorney Maurice Kay and for reply to the answer of the Respondent, admits, denies and avers as follows:

6, 7 and 8. Denies the allegations contained in paragraphs 6, 7 and 8 of the answer.

The Petitioner relies upon the following facts and alleges:

9 and 11. That the books of account disclosed a loss for the years involved. However, due to a redetermination of the depreciation claimed, and the correctness of this is a matter of opinion, and other adjustments made, did the books reflect a profit. That the returns were filed in good faith and the income was correctly reflected to the best of knowledge of the taxpayer.

10 and 12. That the returns were filed in good faith and the income correctly reported and the taxpayer asserts that his opinion and determination was fairly and honestly arrived at. In failing to include the additional income was due to reasonable cause as above stated.

13, 14 and 15. Denies filing a false and fraudulent income and excess profits tax return for the year 1940 with intent to evade the tax and asserts that there was no additional income or excess profits tax arising from the liquidation of the corporation involved as set forth in the petition and that the loss reported on said return was correct to the best of taxpayers knowledge and belief.

16. Denies generally and specifically each and every allegation contained in the answer of the Respondent not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the relief prayed for in the petition be granted.

MAURICE KAY,
(Maurice Kay)
Attorney for Petitioner.

MOTION OF PETITIONER FOR RECONSIDERATION.

21 Filed Aug. 25, 1943.

The Tax Court of the U. S. Denied Aug. 27, 1943, (Signed) R. L. Disney, Judge.

(Title Omitted.)

Petitioner, through its attorney, Maurice Kay, respectfully moves the Court to reconsider its findings of fact and opinion in the above entitled case and as grounds says:

1. The finding of fact that the $1,000.00 paid on the purchase price was paid prior to the liquidation dividend is not supported by the evidence.

(a) The contract of sale was executed on February 26, 1940 and the contract recites the receipt of the $1,000.00 on that date which was subsequent to the liquidation dividend.

(b) This fact is supported and corroborated by other irrefutable evidence. The statement of Mrs. Minnie Miller, it is pointed out by the Court, is necessarily in error and inconsistent with the known facts.

2. The commitment for the sale referred to by the Court, if a commitment at all, was rescinded and notice given thereof before the liquidation. After the rescinding and repudiation of the earlier agreement there was no agreement in effect when the liquidation took place. There was nothing binding upon either party. Even if a verbal agreement could be recognized under the laws of

Florida for the sale of real estate, the verbal agreement was withdrawn. The agreement under which the sale was consummated was admittedly made on February 26, 1940 after the liquidation and while the individual stockholders owned the property.

3. The entire opinion seems to be based upon the finding of fact that the deposit of $1,000.00 was made prior to the liquidation and that there was a valid agreement in effect prior to that time, but evidence of the established fact is to the contrary.

4. The Court finds that the $1,000.00 was paid as part of purchase price when that money was paid in January, 1940, and at a time even before any negotiations were entered into, apparently based upon the ex-parte statement of Mrs. Minnie Miller admitted in evidence when the Court itself finds that the facts set forth in the statement cannot be reconciled with known facts.

Wherefore, petitioner prays that the Court reconsider its findings of fact and opinion and find the facts to be that the $1,000.00 deposit was put up on February 26, 1940, and the sale consummated pursuant to the agreement of February 26, 1940, while the property belonged to the individual stockholders and not the corporation.

Respectfully submitted,
MAURICE KAY,
(Maurice Kay)
Attorney for Petitioner.

Investment Building,
Washington, D. C.

NARRATIVE STATEMENT OF THE EVIDENCE.

24 Lodged Jan. 28, 1944.

Filed Jan. 29, 1944.

(Title Omitted.)

MAURICE KAY,
Attorney for Petitioner on Review.

25 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS HARRY A. MILLER.

Mr. Miller testified that he was secretary and treasurer of the Court Holding Company which was a Florida Corporation. That in addition thereto his business was that of a general contractor. That the petitioner was a holding company for the sole purpose of holding title to a piece of property known as the Mayfield Court Apartments. That the property was leased for three years to Aaron and Regina Feiwish for an annual rental of $8,500.00. (Petitioners Ex. 1.)

Witness further testified that Otto F. Weber, auditor for the company recommended over a period of years beginning with 1938 that the corporation be liquidated; that the recommendation of the auditor was not followed owing to the fact that they were involved in a lot of construction projects, personal liabilities and they did not want this property to become liable for obligations not connected with it. That the corporation did liquidate on February 23, 1940.

Before the meeting in Mr. Weber's office we were approached by Mr. and Mrs. Feiwish, who stated that her sister and brother-in-law were in Miami and would like to buy a building. The meeting was held in the office of Mr. Stanley Meyer at which Mr. Louis Miller, Mr. Fine, Mr. and Mrs. Feiwish, myself and Mr. Stanley Meyer were present. Mr. Stanley Meyer was the attorney for the purchasers and he prepared an agreement for the purchase of the property, which agreement was not executed at the suggestion of our counsel who stated "we cannot go through with this deal; the deal is off." Our counsel stated that the deal was off because income taxes would be so high that he thought it was not advisable to make a deal at that time. I believe this meeting was held on February 22nd. That on February 23, 1940, at a directors meeting the petitioner declared a liquidating dividend in kind of the assets of the corporation. (Petitioners Ex. 2.) That on February 23, 1940 after the directors meeting the stockholders had a meeting and approved and ratified the action of the directors, (Petitioner Ex. 3) and thereafter the petitioner conveyed the property by a properly executed deed, to the stockholders; (Petitioner's Ex. 4) and that there was never any document signed authorizing the sale of the property by the petitioner prior to the time that this instrument was executed.

Cross Examination.

Witness testified that he was responsible for the books of the corporation but that the entries were made by the auditor; that Louis and Minnie Miller were the stockholders and that there were 50 shares of stock outstanding; that all of the stock since November, 1934, except one or two shares was in the name of Minnie Miller. I cannot find in the minute book of the corporation any minutes in connection with consideration to liquidation of the corporation prior to the time of the minutes showing transfer

by petitioner of the Mayfield Court Apartments. Those recommendations were not made at regular meetings. Further, that the directors and stockholders meetings were held on Feb. 23d in the afternoon in the office of Mr. Weber and he signed the corporation returns for the years 1938, 1939 and 1940; that he did not know why the return for the year 1940 was not sworn to. Witness testified that some one was interested in buying the building; that it was the proper time to declare a liquidating dividend as he had no work during the winter months; that all bills were paid or at a minimum and it was safe at that time to declare a liquidating dividend. Also, that the Court Holding Company did not build any buildings and that Minnie Miller was not in the contracting business. Witness further testified that on February 23, 1940, the deal was called off, and that no money had been paid; that the purchaser on February 22, 1940, agreed to accept the price at which the property was offered. On February 23, 1940 Mr. Schwartz, an attorney, prepared a deed transferring title in the Mayfield Court Apartments from petitioner, to its stockholders, which deed was recorded on February 26, 1940. On the same date, February 26, 1940 Mr. Louis and Minnie Miller signed a contract to sell the property.

Re-Direct Examination.

Witness testified that discussions prior to February 23, 1940 concerning a liquidating dividend were informal and at such times as the auditor would come in to work on the books; further that the tax return was prepared and filed by Mr. Weber and that inadvertently the return was not sworn to.

Re-Cross Examination.

No contract was signed as of February 22, 1940; further that at a conference on the 23d in the office of the at-

torney for the purchaser, petitioner's attorney came in and said "the deal is off; we can't make the deal" as they would have to pay a lot of tax—that he did not know how much. He stated that we would be required to pay more taxes if it were handled one way than if it were handled the other. Further, he stated that it was time to declare the dividend, that he had taken it up with Mr. Weber and he stated that we should declare this dividend and not go through with our regular deal or otherwise we would have to pay a lot of taxes.

28 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS HERBERT N. SCHWARTZ.

Witness Herbert N. Schwartz testified that he was an attorney and in no way connected with the Court Holding Company; that he was employed to represent it in connection with the sale of the Mayfield Court Apartments. Witness testified that Harry and Louis Miller came to his office during the month of February and asked me to be present at a conference in Mr. Stanley Meyers Office—that he believed the date was February 22nd—that Stanley Meyers had prepared a contract running from Court Holding Company as sellers to either Feiwish or Fine. I was familiar with the purchase of the Mayfield Court Apartments and knew that it had been acquired at a reasonable price during distress times. I believe that the cost base was low enough to create a rather acute tax problem and I conferred with Mr. Weber, auditor for petitioner and he agreed with me that a serious tax problem was involved. The Miller's were advised not to go thru with the deal and that he advised the people there, Mr. Meyers and his clients that the Court Holding Company would not consummate any deal.

That before this discussion a number of questions had arisen relative to the deal concerning purchase price, how it was to be secured, what type of mortgage was to be given back; that the transaction was involved there being first and second mortgages which the purchaser contemplated assuming; a third mortgage to be given back and there was a number of questions that arose as to payments under the third mortgage, rate of interest and so on.

That on the following day several conferences were held in Mr. Weber's office with the Miller's and the discussion revolved around the advisability of a liquidating dividend. That after the deal was called off he did not represent the Miller's in any further negotiations for the sale of the property.

Cross Examination.

Witness testified that Mr. Myers drew an agreement based on advice given to him by his client and that he had nothing to do with the preparation of that agreement. That no agreement was entered into between the Court Holding Company and the Fines—that the Court Holding Company would not consummate the deal and said "we have got a tax problem which makes it impossible for the Court Holding Company to sell. It may be that we are going to declare a liquidating dividend, and that thereafter we can get together. There was nothing definite about it at all, I said, I don't know." That he drew the deed prior to the meeting of the Board of Directors on February 23d in anticipation of the property being acquired and that the deed was executed after the directors and stockholders meeting.

30 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS OTTO F. WEBER.

Otto F. Weber testified that he was a certified public accountant since 1923 and that he was not connected with the Court Holding Company except as an accountant; that the last transaction was when the property was conveyed by a dividend in kind on February 23d; that the only asset of the Corporation was an apartment building and a vacant lot next to the building. Witness testified that he recommended as early as 1938 that the corporation declare a liquidating dividend in view of possible increased taxes; that the business was in fact run as Minnie Miller's business; that Louis Miller did not want to do it while he had large contracts in progress as he did not want the property to become subject to personal liabilities if something went wrong with the contracts. Further, that he was present at a conference on February 23d between the officers and stockholders and the attorney; that the deed was drawn in his office and signed in the afternoon of Feb. 23d after the meeting of the directors and stockholders.

Witness further testified that he prepared the income and excess profits tax returns of petitioner for the years 1938, 1939 and 1940; that the return for 1940 was due to be filed on March 25, due to an extension of time granted and that the extension was not limited to ten days from March 15.

Witness further testified that he made and supervised the entries in the books of the corporation and that the last entry made was on February 23d. That rent was entered in the books for the year 1940 in the amount of $1,000. That at the time the return was made up he did not have the information whereas the books had to be written later on. That the return was filed without being sworn to was an oversight.

Cross Examination.

Mr. Weber testified that the deed was made out in his office about five o'clock after the draft of the minutes was made by his secretary; that it was made up after the meeting and executed that day. The entries in the books for the years 1938, 1939 and 1940 were all written up at the same time and were entered after the agent came to make his examination. When I prepared the income tax returns I did not have the books and returns for the three years, therefore, cannot reconcile them with the books. The income or losses according to the books as they now exist are as follows: 1938, a profit of $877.78; 1939, a profit of $1,170.25, and for the period ending Feb. 23, 1940 a loss of $450.50.

Witness testified that if corporation made the sale of the property it would have a tax to pay--that he prepared the income tax return of Minnie Miller for the year 1940 (Def. Ex. D) and that the net profit in the long term capital gain and loss schedule was $14,526.68 which amount should be approximately the profit that the corporation would have to pay a tax on if the corporation sold the property. That on the return of Minnie Miller was an explanation that the sale represented the fair market value of the assets distributed to its stockholders by a dividend in kind on February 23d and paid back by stock; that Minnie Miller did not show a sale in her return as she was merely getting an excess of the cost of her stock to her.

Mr. Weber also testified that many rent checks were deposited in the account of L & H Miller Co. or Astor Holding Company; that both corporations having an active bank account.

Re-Direct Examination.

Witness testified that no amended returns were filed after the books were written and that the books were written about the time the agent was sent to examine the account. The general entries for the years 1938, 1939 and 1940 were made in the late fall of 1941.

32 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS LOUIS MILLER.

Mr. Miller testified that he is in the contracting business and that he is president of the Court Holding Company. That the Court Holding Company was a holding company for the Mayfield Court; that the property was operated by the lessee and that the stipulated rental of $8,500.00 per annum was paid the entire time the lease was in effect.

Witness testified that the accountant recommended the dissolution of the corporation as early as 1938 due to possible increased taxes but at the time due to construction work, obligations and judgments outstanding he "can't do it right now." That in 1940, the lessee Mr. & Mrs. Feiwish talked about buying the property; that he finished the construction work, paid off the bills and then thought about dissolving the corporation.

Further, Mr. Miller testified that on February 20 or 21, "we come to an understanding of $54,500." as the purchase price of the property. A conference in the office of Mr. Myers, attorney for the purchaser, between all parties, and Mr. Schwartz, attorney for the Miller's advised against selling the property "because the income tax will be more than you figured". That thereafter directors and stockholders meetings were held in Mr. Weber's of-

fice at which time a liquidating dividend was declared following which the corporation issued a deed to Mr. & Mrs. Miller.

That witness testified that after the property was deeded to himself and Mrs. Miller, they signed a contract with Mr. & Mrs. Fine on Feb. 26, (Pet. Ex. 5) and that settlement was made the beginning of April 1940. (Pet. Ex. 6.) That the Court Holding Company had no assets and received no income after February 23d.

Witness testified that the income tax returns were prepared by Mr. Weber, and that he didn't know why the return was not sworn to.

Cross Examination.

Witness testified that on February 22d, he saw Mr. Schwartz, his attorney and asked him to come down to Mr. Myers office that he was going to sell the property; that Mr. Schwartz advised against selling the property unless the corporation was dissolved; that after meetings of the directors and stockholders dissolving the corporation a deed was issued to Mr. & Mrs. Miller.

That an agreement for the sale of the property was signed on Feb. 26, and the price of the property was the same. That the Feiwish's paid their rent on time and lived up to the terms of the lease.

Re-Direct Examination.

Witness testified that all details covering the sale of the property was not agreed to until after Feb. 23d.

Further, that we borrowed $3,500.00 from Mrs. Feiwish on different dates. The note dated June 10, 1939 in the amount of $500.00 which you hand me was executed by me. The notation on the face of the note shows it was paid. "It was paid when the rent was due, they paid us

with the note." That was on December 7, 1939. The document you now hand me is a note dated June 13, 1939 for one year made payable to Aaron and Regina Feiwish for $1,000. and, is signed by me, which was paid by applying it on January rent. There was a third note in the amount of $2,000. which was paid.

At the time we gave the notes we needed money. The rent was not due so we called Mrs. Feiwish and asked if she can help us out and lend us some money on the rent. "So she says what security can I get?" I says "we will give you our note—my personal note and we will deduct from the rent when the rent comes due," and we paid her a little bonus for that, $350.00.

35 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS EDWARD MERCER.

Mr. Mercer testified that he is Vice President and Cashier of the Mercantile National Bank of Miami Beach and that he has charge of the records of the bank. That during the years 1938 to 1940 Aaron Feiwish had a checking account with the bank and that a number of checks were issued to the Miller's during this period. (Def. Ex. E.)

NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS STANLEY C. MYERS.

Mr. Myers testified that he is a practicing attorney at Miami, Florida, and that he represented Mrs. Feiwish in Feb. 1940 in connection with the contemplated purchase of an apartment building. That on February 22, 1940, was the initial conference between the Feiwish's, Fine's and

Miller's. The subject of the conference was the pending negotiations for the acquisition and purchase of the Mayfield Court Apartments, which were then under lease by Mrs. Feiwish. That the parties outlined the terms and conditions of a purchase and sale of the property; that he was told the seller was the Court Holding Company and the purchaser Margaret W. Fine and that he was requested to prepare a contract. That on Feb. 23, he prepared a memorandum agreement and deposit for the purchase and sale of the property—that the draft of the memorandum agreement was submitted to Mr. Schwartz, attorney for the sellers, for his approval. That the draft was returned on the 24th with a memorandum to the effect that the owners of the Mayfield Court are Louis and Minnie Miller; that he has a deed from the corporation to these parties. That the contract was redrawn to correctly state the names of the sellers and other minor corrections in the agreement. That the contract was redrawn on February 25th and signed by the Miller's as vendors and Margaret W. Fine as purchaser.

Witness further testified that Mr. Schwartz, attorney for the Miller's informed him that the corporation could not go thru with the contract as there was a tax problem involved and that the deal would have to be made in the name of the individual stockholders. There was a very small deposit put up.

Cross Examination.

I am unable to say whether or not Mr. Schwartz was present at the original conference. I drafted the original agreement and the parties named in the agreement were the Court Holding Company and my client, Margaret Fine. My original memorandum contained all the information that I would need to draw a contract of purchase and sale. The original agreement was never signed by the parties.

That the new contract was drafted on February 24 and signed on the 26th. That the contract was drawn between the Miller's and M. W. Fine was the only contract signed; that the transaction was closed April 1, 1940. The amount of cash paid at the closing was $12,500. It was made up of two items; $2,525 in cash, which had been paid by the buyer to the seller since the date of the preliminary agreement; that was February 26, 1940, and before the closing; it must have been some private transaction; and the balance of $9.975 was deposited with me as escrow agent at the closing, for the purpose of recording deed, bringing the abstract down to date making sure there were no intervening entries between the last deed to the Miller's and the deed to my client; and to distribute certain items out of the cash, that were necessary to clear the title; payment of 1939 taxes, intangible taxes, personal property taxes and the documentary stamps on the deed. On April 8, 1940 I drew a check of $8,384.07, payable to Arthur Friedman, as attorney for Louis Miller and Minnie Miller, his wife, and attaching that check to a statement of disbursements, setting forth the items between the amount paid to Mr. Friedman and the $9,975.00 which was delivered to me in escrow." No disbursements were made to the Court Holding Company.

37 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS ELMER W. COOK.

Witness testified he has been employed in the U. S. Government as an Internal Revenue Agent for approximately twenty years and that in the course of his business that of Internal Revenue Agent, he was required to examine the returns filed by the Court Holding Company. At the time he called to make his examination there were

no books available and that he had to wait until Mr. Weber, accountant for the Court Holding Company, wrote them up. It was during the course of his examination, particularly with reference to the 1940 income tax return involving the transfer of the Mayfield Courts. He discussed the transaction with Mrs. Fine, Mr. Weber and Mrs. Minnie Miller. The matter was discussed with Mrs. Miller and Special Agent Brown was present. Mrs. Miller stated how she acquired the stock of the corporation, how she owned the stock and also how she designed the sale of the Mayfield Court Apartments. She also stated that all payments made after the first year's rent of the lease were part of the selling price. Special Agent Brown dictated a statement and asked Mrs. Miller as to the correctness of it after each sentence or so. Mrs. Miller was quite positive in her statements as to just what occurred. She was not coerced in any way in making the statements. Mrs. Miller appeared to understand what we were talking about in connection with the application of rental payments after the first year's lease on the purchase price of the property. This question was asked several times, in different ways. The document you hand me is the statement dictated by Special Agent Brown and was signed by Minnie Miller at the time of her conference with Mr. Brown and myself. There would be a considerable difference in the tax that would be due to or collected by the Bureau of Internal Revenue if the corporation sold the property as contended by the respondent, rather than having the property sold by Mr. & Mrs. Miller, as contended for by the petitioner.

Cross Examination.

Witness testified that the only persons present with Mrs. Miller was Special Agent Brown, the stenographer and himself. That Mrs. Miller come with her bookkeeper,

Mr. Brotman, but "he wasn't in there" at the hearing; that "I didn't admit him or bar him."

The witness inquired for the books in the summer of 1941; that he discussed the matter with Mr. Weber but does not know the exact date; that he discussed with Mr. Weber the liquidating dividend that "it come up in the examination when I looked at the minute book"; that "it was just an ordinary conversation. I don't know the nature of it—to the effect how it would be one way and another, either a sale by the corporation or a sale by the individual."

That the return for 1940 was checked against the books after they were written up. That for the year "1939 the $8,500.00 less a discount of $350.00 was from the Feiwish lease—1940, $1,000.00 rent, the books show."

That the amount of rent set up on the books of the corporation show $9,000.00 for 1938 and $8,500.00 for 1939; that "an examination of checks of the lessee, several thousand in addition to the amount set up on the books is shown as being paid to the Lessors" but "I don't know whether it was for rent."

39 NARRATIVE STATEMENT OF THE TESTIMONY GIVEN BY WITNESS J. J. BROWN.

I have heard the testimony of Mr. Cook, preceding witness with respect to the conversation with Mrs. Miller. I was present at that conversation. The conference was held in my office in the Federal Building here. She came into my office with a man named Brotman, who wanted to know if he could be in with her while we interrogated her. I told him no that he could not be with her. We wanted to get a statement about the matter. We talked with Mrs. Miller a short time and interrogated her about this sale and she told her story. I asked her if she was

willing to give a statement under oath, an affidavit, and she said she was. I called in our stenographer, Mrs. Killing, and dictated a statement, and as I dictated it, asked her if the statements were correct. Mrs. Killing typed the statement and handed it to me. I handed it to Mrs. Miller, she read it, she initialed the first page, signed it and I gave her a copy of it. The statement about which I am testifying is in evidence as respondent's Exhibit "F".

The foregoing is all of the material evidence adduced at the hearing before the Tax Court of the United States bearing upon the issues involved in this case.

MAURICE KAY,
(Maurice Kay)
Attorney for Petitioner on Review.

J. P. WENCHEL CAR.
(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

Filed and approved this 29 day of Jan. 1944.

R. L. DISNEY,
Judge, Tax Court of the U. S.

41 PETITIONER'S EXHIBIT 1.

The Tax Court of the U. S. Div. 4, Docket 111075, admitted in Evidence Jan. 21, 1943.

Indenture of Lease.

This indenture made and entered into this .... day of ....., 1938, at Miami, Dade County, Florida,

by and between Court Holding Company, a Florida corporation, hereinafter called the Lessor, and Aaron Feiwish and Regina Feiwish, his wife, of Sharon Springs, New York, hereinafter called Lessees, which terms "Lessor" and "Lessees" shall include their successors, legal representatives, heirs and assigns whenever the context hereof so requires,

Witnesseth, That the Lessor for and in consideration of the rents herein reserved and stipulated to be paid by the Lessees, and in consideration of the mutual covenants herein contained, by the parties hereto to be kept and performed, does hereby lease and demise unto the Lessees the following described premises, lying being and situate in the City of Miami Beach, Dade County, Florida, and more particularly described as follows, to-wit:

Lots Three (3), Four (4) and Five (5) of Block Forty-Six (46) of Ocean Beach Addition No. 3, a subdivision of Dade County, Florida, according to the plat thereof recorded in Plat Book 2 at page 81 of the Public Records of Dade County, Florida; together with all the buildings erected thereon, and all improvements thereunto appertaining, and all of the furniture, furnishings and equipment placed or to be placed in and upon said building as per inventory thereof, to be attached and made a part hereof and marked "Schedule A"; the furniture included in said inventory being used furniture and not new furniture, and is acceptable to the Lessees in such condition; the premises above described being otherwise known and described as Mayfield Court Apartments No. 730 Pennsylvania Avenue, Miami Beach, Florida.

It is expressly Understood and Agreed that the above described premises are to be fully and completely furnished as an apartment building, except as hereinafter pro-

vided, but that the furniture and furnishings therein are used and not new furniture and furnishings at the time the Lessees take possession under the terms of the within lease. Provided that it is expressly agreed and understood that the lessees accept the furniture and furnishings in their then existing condition at the time of taking possession, and that the Lessor is in no wise obligated to furnish or deliver any such furniture or furnishings except as is now on the premises or on the premises at the time of taking possession.

To Have And To Hold the above described premises unto the said Lessees for a term of three (3) years from the 1st day of October, 1938, said term terminating at midnight on the 30th day of September, 1941, the said Lessees yielding and paying unto the Lessor as rent therefor the total sum of Twenty-five Thousand Five Hundred ($25,-500.00) Dollars, payable in the following manner, to-wit:

Two Thousand ($2000.00) Dollars on or before October 1, 1938;

One Thousand ($1000.00) Dollars December 15, 1938;

One Thousand Five Hundred ($1500.00) Dollars January 15, 1939;

Two Thousand ($2000.00) Dollars February 1, 1939;

Two Thousand ($2000.00) Dollars February 20, 1939;

Two Thousand ($2000.00) Dollars on or before October 1, 1939;

One Thousand ($1000.00) Dollars December 15, 1939;

One Thousand Five Hundred ($1500.00) Dollars January 15, 1940;

Two Thousand ($2000.00) Dollars February 1, 1940;

Two Thousand ($2000.00) Dollars February 20, 1940;

Two Thousand ($2000.00) Dollars on or before October 1, 1940;

One Thousand ($1000.00) Dollars December 15, 1940;

One Thousand Five Hundred ($1500.00) Dollars January 15, 1941;

Two Thousand ($2000.00) Dollars February 1, 1941; and

Two Thousand ($2000.00) Dollars February 20, 1941;

In addition thereto, the lessees further agree to pay unto the Lessor, at the time of the execution hereof, the sum of Two Thousand ($2000.00) Dollars in cash, the receipt whereof is hereby acknowledged, which said sum is to be held by the Lessor as a guarantee for the return of the personal property and building and improvements by the Lessees at the expiration of the demised term, in the same condition as the same now is, reasonable wear and tear and damage by the elements excepted. Said sum of Two Thousand ($2000.00) is also a deposit and guarantee for the payment of rent as hereinabove provided for, and the Lessor is hereby expressly granted the right, at its option, upon default in the payment of any installment of rent when due as herein provided, of applying so much of said deposit of Two Thousand Dollars ($2000.00) as may be necessary to pay up and cure said default.

4. It is further agreed that said deposit of Two Thousand Dollars ($2000.00) shall at the termination of this lease and upon the tender by the Lessees to the Lessor of possession of the premises, be returned to the Lessees, after deduction from said sum of all such damage as shall be done to said property during the occupancy of the premises by the Lessees, and the Lessor shall pay lessees interest on any unused balance of said Two Thousand ($2,000.00) Dollars deposit at 4% per annum payable on or before October 1st each year.

Covenants and Agreements.

5. The Lessor agrees to deliver possession of the premises to the Lessees on or before the 1st day of October, 1938, free of tenants or any other person having possession of the said demised premises, or any part thereof, or to procure, in lieu thereof, statements from such tenant or person showing that such tenant or person has no claim of any kind against the demised premises, and in the event that it shall become necessary to evict such tenant, or person to pay all expenses incurred in connection with the eviction of such person or tenant.

6. The Lessees agree to use the name "Mayfield Court Apartments" in the operation of the demised premises during the existence of the within lease and that the right in said Lessees to the use of said name shall exist only during the duration of the within lease and during the occupancy by the Lessees of the demised premises.

7. The Lessees further agree that they shall make such replacements in the furniture and furnishings in said apartment house, and such renovation of said apartment house and equipment as may be necessary from time to time during the term of this lease, and that the Lessor

shall in no wise be obligated therefor, nor shall the Lessees be entitled to any credit therefor.

Covenants of the Lessees.

The Lessees do hereby agree to keep, perform, and abide by the following conditions and covenants:

8. To pay the rent herein reserved at the time and in the manner aforesaid, and should said rent or any installment thereof remain at any time due and unpaid after the same shall become due, and should said default continue for a period of five (5) days, the Lessor may at its option consider Lessees tenants sufferance and the said Lessor may give Lessees notice of its intention to re-enter the premises and declare the entire rent then remaining due under the terms of said lease, immediately due and payable, and unless the Lessees shall remedy the default within ten (10) days thereafter the Lessor may immediately re-enter upon the said premises and the entire remaining rent for the remaining period of this lease shall at once become due and payable and forthwith be collected by distress or otherwise, and in such event the Lessees shall not be entitled to any refund, rebate, or accounting for rents, or the repayment of any sums which may have been made in connection with or by reason of this lease.

9. To pay all charges for gas, electricity, and other illuminants and power and for water used in connection with the operation of said premises, not more than five (5) days after the same shall become due and payable, and to pay all licenses and operating taxes for the operation of the business conducted upon the demised premises and to make all meter deposits necessary to obtain such service promptly upon taking of the possession of the demised premises; in the event the Lessees shall sublet the indi-

vidual apartments in the operation of their business with the understanding that the sub-lesses shall furnish their own deposits, that in no event shall obviate the liability of the Lessees herein to see that such meter deposits are made and such bills as shall be incurred are properly paid.

10. That the demised premises shall not be used for any purpose other than that of conducting a high-class apartment house of reputation and character such as is maintained by said apartment house under its present or immediate past management.

11. To use said premises in accordance with the laws and ordinances thereunto applicable.

12. Not to permit any misuse of said premises, or any noise or nuisance to be maintained thereon detrimental to the reputation of the premises or annoying to the abutting owners.

13. To maintain both the interior and exterior of said premises, and all buildings, equipment and improvements erected on the demised premises, in the same condition as the same is now, reasonable wear and tear and damage by the elements alone excepted.

14. To make no material change or improvement or alteration of the demised premises or to make any structural additions thereto without the consent of the Lessor in writing first had and obtained, and in the event of the making of such alterations, improvements or additions, with such consent obtained, then such alterations, improvements and additions shall become and be the property of Lessor; provided, however, that in the event of such improvements or additions, that Lessees will not suffer any lien for labor or materials to be placed against the de-

mised premises or any part thereof and in the event any lien shall be filed, the Lessees shall cause the same to be canceled and surrendered by a bond or otherwise, within Fifteen (15) days after the same shall have been duly filed and recorded, and within fifteen (15) days after notice in writing by the Lessor, and the Lessees shall further hold the Lessor harmless from any claim or damage resulting therefrom.

Conversely, the Lessor agrees that in the event of any improvements or additions being made by the Lessor during the term of this lease, that said Lessor will not at any time suffer any mechanics' liens or other liens to be placed against the demised premises or any part thereof, and if any shall be filed and recorded the Lessor shall cause the same to be discharged and canceled within Fifteen (15) days after notice by the Lessees to the Lessor, and the Lessor shall further hold the Lessees harmless for any claim or damage resulting therefrom.

15. That the Lessor or its agent may enter and view the said premises at any reasonable time and may make repairs should the same be necessary.

16. That the said Lessees will not erect any signs upon any part of the premises herein demised without first receiving the written consent of the Lessor.

17. The Lessees further agree that they will not mortgage, encumber, pledge, assign, or sublet this lease, with the exception of the leasing of apartments in the usual and customary manner, without the consent in writing of the Lessor, first had and obtained.

Covenants of the Lessor.

And the Lessor does covenant and agree with the Lessees:

18. That upon the performance by the Lessees of the terms and conditions hereof, the Lessees shall have quite and peaceable enjoyment and possession of said premises and all parts thereof free from molestation by the Lessor or any person claiming by and under it while Lessees are in good standing under this lease.

19. To pay all taxes which may be assessed against the demised premises by virtue of ownership by the Lessor thereof, and to save the Lessees harmless from any claim or damage resulting from the failure to pay such taxes as herein provided. Provided that it is expressly covenanted and agreed that in addition to the other rents hereinabove provided, the Lessees shall pay to the Lessor as additional rent, on or before November 1, of each year of the lease term, a sum of money equal to the increase of City of Miami Beach and State and County taxes, both real estate and personal, on the demised premises, over and above the amount of such taxes for the year 1937. It is the intention of the parties that, in view of the reduction in rental contained in this lease, as against the rental obtained by the Lessor for the year 1937, that the Lessor should be protected from having to pay taxes upon the demised premises in excess of the amount paid by the Lessor for the year 1937.

20. To keep and maintain in force sufficient insurance at all times during the demised term to cover the sum of this lease and the interest of the Lessees herein.

Mutual Covenants.

The parties hereto do hereby mutually covenant and agree each with the other:

21. That in the event of a bona fide sale by the Lessor of the said premises at any time between May 1 and November 1 in any year during the term of this lease, that this lease shall, on or before said date, be canceled and terminated at the option of the Lessor, upon the Lessor giving notice in writing of such bona fide sale from the Lessor to the Lessees at least thirty (30) days in advance of such proposed sale and cancellation of this lease, provided that within such thirty (30) day period, the Lessees are hereby expressly granted the option (in the event of any such proposed bona fide sale) of purchasing the leased premises upon the same terms and conditions as the proposed bona fide sale, upon giving to the Lessor notice in writing on or before fifteen (15) days from the date of the aforesaid written notice, of their exercise of their option to purchase. In the event that a bona fide sale is proposed and the Lessor exercises its option to cancel this lease, after giving the aforesaid thirty (30) days' notice, and the Lessees fail, neglect and refuse to exercise the above option to purchase the premises on like terms and conditions, then, and in that event, the Lessor shall repay to the Lessees, all sums of money theretofore paid by the Lessees to the Lessor, as bond and security under this lease (i. E. the Two Thousand ($2000.00) Dollars in cash deposited, less any defaulted rents and damages of deficiency in return of the property as provided for in paragraph three (3) of this lease) and, in addition, shall pay to the Lessees the sum of One Thousand ($1000.00) Dollars as liquidated damages, which said sum is hereby mutually agreed to be reasonable for the surrender by the Lessees to the Lessor of the demised premises and the

Lessees' interest therein; and upon such payments by the Lessor, as hereinabove provided, this lease shall be terminated, provided the Lessees shall first (or simultaneously) quit and deliver up the premises to the Lessor.

22. That the Lessor shall maintain full insurance coverage to cover the interest of the Lessees at all times and the Lessees shall maintain public insurance in the minimum sum of ten to twenty thousand dollars, which said public liability insurance policy shall be deposited with the Lessor.

23. That in the event at any time during the term of this lease, the demised premises shall become destroyed by fire or windstorm so as to be wholly unfit for use and occupancy the Lessor shall have the option of either terminating this lease and cancelling the same thereupon remitting to Lessees any unused and unearned portion of the rent upon a fair and reasonable adjustment thereof and upon such election by the Lessor, this lease shall be terminated and the Lessees shall have no further right or cause of action against the Lessor by reason of the terms and conditions hereof, or in the event the said premises are damaged or destroyed as hereinbefore set forth the Lessor may at its option renovate, repair and rebuild the premises remitting to Lessees a fair amount of the rental reserved proportionate to the length of time required for the repairs to be made and the time elapsing before the premises are again made fit for occupancy and use. In the event the Lessor shall exercise its option to repair, such repairs shall be commenced and completed within ten (10) days after the time when the premises or any portion thereof shall become untenantable or unfit for use and if the Lessor fails to complete the said repairs within said period of time then it shall be optional with the Lessees to consider this lease canceled and thereupon the rents shall be re-

mitted in the manner above set forth. In the event that a portion of the premises shall be damaged by fire or windstorm then and in that event the portion so damaged shall be promptly repaid by the Lessor within a period of time not more than ten (10) days from the occurrence of said damage and during the period of such repair a proportionate part of the rental herein provided for shall be abated or credited to the Lessees, consistent with the amount or portion of the premises which shall be rendered unfit for use during the period of repairs.

24. The parties do agree that the demised premises are encumbered by a first mortgage dated the 5th day of February, 1937, from the Lessor to Jefferson Standard Life Insurance Company in the principal sum of Thirty-seven Thousand Five Hundred Dollars ($37,500.00) which said mortgage is recorded in Mortgage Book 1077 at Page 324 of the Public Records of Dade County, Florida.

It is mutually agreed that in the event any payment of principal or interest, due upon said mortgage shall not be promptly paid by the Lessor, then and in that event the Lessees are privileged and entitled to make said payments direct to the mortgages and the payments so made by the Lessees as aforesaid shall constitute payment of rent or other indebtedness from the Lessees to the Lessor and the Lessees shall be entitled to credit upon such rent or indebtedness for the payments so made.

25. The parties hereto do further agree that in the event of disagreement as to the amount to be deducted from the security payment of Two Thousand Dollars ($2,000.00) hereinbefore described for damage to the personal property in the premises contained during the demised term, that in such event the disagreement, if any, shall be settled by award of three (3) arbitrators to be chosen

by the parties hereto in the following manner, to-wit, the Lessor shall choose one arbitrator, the Lessees shall choose one arbitrator, and the two so chosen shall select the third arbitrator. At the termination of this lease and in the event of disagreement, and in the event of the selection of arbitrators as herein provided the said arbitrators shall render their report and award within ten (10) days after their selection, and the parties hereto do mutually agree to render such assistance as shall be necessary to the reaching of a prompt decision by the said arbitrators. Provided that the Lessees shall first quit and give up full and peaceable possession of the demised premises, it being agreed nothing herein contained in any wise authorizes or permits the Lessees to remain in possession after the termination of, or default in, the terms of this lease.

26. It is further expressly agreed that the Lessees will not use or permit the premises to be used for any purpose that will increase the rate of insurance thereon, nor will Lessees keep or permit to be kept or used in or on said premises any inflammable fluids or explosives without the written consent of the Lessor first had and obtained.

27. It is further mutually agreed that notices provided for in and by this agreement shall be construed to have been made when the same shall be directed to the Lessor in care of Arthur S. Friedman, Seybold Building, Miami, Florida, and to the Lessees, or either of them, at the leased premises.

28. That the Lessor or its agent at any time within thirty (30) days before the expiration or termination of this lease may place upon said premises or any reasonable part thereof a notice of reletting the same and the Lessees agree not to remove or obstruct said sign or notice, and to permit all persons having written authority from the Lessor to view the premises at any reasonable time.

29. It is further understood and agreed by and between the parties that the conditions and covenants of this lease contain the entire contract between the parties and no oral representations, promises or undertakings shall affect, vary or alter the terms of this lease in any particular, and that time is of the essence of this agreement.

30. And it is further mutually agreed that any waiver or extension which may be granted by the Lessor to the Lessees shall not be construed to be a waiver of any other provision of this lease or to require any similar indulgence by the Lessor upon any subsequent occasion.

31. In consideration of the premises, the Lessor hereby grants to the Lessees, the right, option and privilege of purchasing the demised premises at any time up to November 1, 1938, at an aggregate purchase price of Sixty Thousand ($60,000.00) Dollars, payable as follows:

Ten Thousand ($10,000.00) Dollars in cash upon the exercise of the option (of which $10,000.00 any amount heretofore paid by the Lessees under the terms of this lease shall be credited to an applied as part payment);

Assumption of first mortgage mentioned in Paragraph 24;

Balance necessary to aggregate the sum of Sixty Thousand ($60,000.00) Dollars shall be evidenced by Lessees promissory note in writing, secured by a second mortgage on the premises payable $2000.00 on or before one year from date thereof; $2000.00 on or before two years from date thereof; and the balance on or before three years from the date thereof, with interest at the rate of 8% per annum, payable semi-annually.

But nothing herein contained shall give the Lessee any right, privilege or option after midnight November 1, 1938, or any interest whatsoever in and to the demised premises, save and except as a tenant thereof.

32. In consideration of the premises, the Lessor hereby grants to the Lessees, the option of extending and continuing this lease for an additional two years from midnight September 30, 1941, upon like terms and conditions as herein contained, save and except the option to purchase contained in paragraph 31 hereof, which shall not be included therein, *provided that* the Lessees, at the time of exercising said option, shall not be in default in any of the terms of conditions of this lease, and shall notify the Lessor in writing of their election to exercise said option on or before January 1, 1941.

33. In view of the fact that the leased premises are now under a lease to third persons up to and until September 1, 1939, it is agreed that no inventory shall be attached at the time of the execution hereof, but that an inventory shall be taken by the parties Lessor and Lessees on or before the time of the Lessees taking possession, which said inventory shall be attached to and incorporated herein as a part hereof in lieu and instead of the inventory referred to in paragraph two of this lease.

In Witness Whereof the Lessor has caused these presents to be signed in its name by its President and attested by its Secretary, and its corporate seal to be affixed, and the Lessees have hereunto set their hands and seals the day and year first above written.

COURT HOLDING COMPANY,
a Florida corporation.

By .....
President.

Attest:

.....
Secretary.
Lessor.

(Seal) (S.) AARON FEIWISH,
(Seal) (S.) REGINA FEIWISH,
Lessees.

Signed, sealed and delivered in the presence of:

.....

.....

As to Lessor.

.....

.....

As to Lessees.

State of Florida,
County of Dade, ss.

I, as officer duly authorized to take acknowledgments according to the laws of the State of Florida, duly qualified and acting, Hereby Certify that Louis Miller, as President, of Court Holding Company, a Florida corporation, to me personally known, this day acknowledged before me that he executed the foregoing lease as such officer and that he affixed thereto the official seal of said corporation. And I Further Certify that I know the said persons making said acknowledgments to be the individual described in and who witnessed the said lease.

In Witness Whereof I hereby set my hand and official seal this .... day of ....., A. D. 1938.

.....

Notary Public, State of Florida at Large.

My commissions expires:

State of Florida,
County of Dade, ss.

I, as officer duly authorized to take acknowledgments according to the laws of the State of Florida, duly qualified and acting, Hereby Certify that Regina Feiwish, to me personally known, this day acknowledged before me that she executed the foregoing lease for the purposes therein

expressed; and I further Certify that know the said persons making said acknowledgments to be the individual described in and who executed the said lease.

In Witness Whereof I hereby set my hand and official seal this .... day of ....., A. D. 1938.

.....
Notary Public, State of Florida at Large.

My commission expires:

49 PETITIONER'S EXHIBIT 2.

The Tax Court of the U. S. Div. 4, Docket 111075, Admitted in Evidence, Jan 21, 1943.

Minutes of Special Meeting of the Board of Directors of Court Holding Company

A special meeting of the Board of Directors of Court Holding Company was held at 1216 Alfred I. DuPont Building, Miami, Florida, at 4:00 P. M. on February 23, 1940, pursuant to the foregoing call and waiver of notice.

Louis Miller called the meeting to order and presided, and Harry A. Miller acted as secretary of the meeting.

On roll call of the directors by the secretary, the following were found to be present.

Louis Miller
Minnie Miller
Harry A. Miller

All of the directors of the corporation being present, the Chairman announced that the meeting was competent to proceed with the transaction of the business for which it had been called, and any other proper corporate business.

The chairman proposed that it would be in the best interest of the corporation to have it declared a dividend, payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock.

Whereupon the following resolution was offered and unanimously adopted:

Be It Resolved that a dividend is hereby declared payable in all the assets of the corporation, to wit:

Lots 3, 4 and 5 of Block 46 of Ocean Beach Addition #3, according to the Plat thereof recorded in Plat Book 2, at Page 81, of the Public Records of Dade County, Florida, together with the buildings and improvements now or hereafter erected or placed thereon, and also all furniture, furnishings and fixtures, equipment and personal property, of every kind, character and description now in or about the buildings on said premises or used in connection therewith or which may hereafter be placed by the mortgagor or any subsequent owner or owners of the said premises, in, on or about the buildings on the said premises as the furniture, furnishings and equipment of such building.

Subject to a first mortgage in the sum of $28,290.00 held by the Jefferson Standard Life Insurance Company, and a second mortgage in the sum of $7500.00 held by Carrie Rosen, and further subject to a lease between the cor-

poration and Aaron Feiwish and Regina Feiwish, his wife, in complete liquidation and surrender of all the outstanding corporate stock of the corporation held by Louis Miller and Minnie Miller.

Be It Further Resolved that the officers of the corporation are hereby empowered and authorized to execute all necessary instruments to carry out the purpose of the foregoing resolution.

There being no further business to come before the meeting, the meeting was adjourned.

(Signed) HARRY A. MILLER,
Secretary.

Approved:
(Sgd.) LOUIS MILLER,
Chairman.

Approved:
(Sgd.) MINNIE MILLER,
Director.

51 PETITIONER'S EXHIBIT 3.

The Tax Court of the U. S. Div. 4, Docket 111075, Admitted in Evidence, Jan. 21, 1943.

Minutes of Special Meeting of Stockholders of Court Holding Company.

A special meeting of the stockholders of Court Holding Company was held at 1216 Alfred I. Du Pont Building, Miami, Florida, at 4:30 P. M. on February 23, 1940, pursuant to the foregoing call and waiver of notice.

Louis Miller called the meeting to order and acted as chairman.

Upon roll call by Louis Miller there was found to be present

Louis Miller
Minnie Miller

owners of the outstanding capital stock of the corporation. There was also present Harry A. Miller, secretary of the corporation who acted as secretary for the meeting.

The chairman then announced that the meeting was competent to proceed with the transaction of the business for which it had been called, and any other proper business to come before the stockholders.

The chairman stated that at a meeting of the board of directors had on the same day at 4:00 o'clock P. M., the directors had determined that it would be to the best interest of the corporation to have it declare a dividend in the assets of the corporation consisting of

Lots 3, 4 and 5 of Block 46 of Ocean Beach Addition #3, according to the Plat thereof recorded in Plat Book 2, at Page 81, of the Public Records of Dade County, Florida, together with the buildings and improvements now or hereafter erected or placed thereon, and also all furniture, furnishings and fixtures, equipment and personal property, of every kind, character and description now in or about the buildings on said premises or used in connection therewith or which may hereafter be placed by the mortgagor or any subsequent owner or owners of the said premises, in, on or about the buildings on the said premi-

ses as the furniture, furnishings and equipment of such building.

Subject to a first mortgage in the sum of $28,290.00 held by the Jefferson Standard Life Insurance Company, and a second mortgage in the sum of $7500.00 held by Carrie Rosen, and further subject to a lease between the corporation and Aaron Feiwish and Regina Feiwish, his wife, in complete liquidation and surrender of all the outstanding corporation stock.

The chairman then read to the meeting the minutes of said meeting of the board of directors.

Whereupon, by motion duly made and unanimously carried, the following resolution was offered and adopted.

Be It Resolved that all acts and resolutions passed by the Board of Directors at a special meeting held at 1216 Alfred I. Du Pont Building, Miami, Florida at 4:00 o'clock P. M. on February 23, 1940, is hereby approved, ratified and confirmed in all respects.

There being no further business to come before the meeting, the meeting was adjourned.

(Sgd.) HARRY A. MILLER,
Secretary.

Approved:
(Sgd.) LOUIS MILLER,
President and Stockholder.

Approved:
(Sgd.) MINNIE MILLER,
Stockholder.

53 PETITIONER'S EXHIBIT 4.

The Tax Court of the U. S. Div. 4, Docket 111075, Admitted in Evidence Jan. 21, 1943.

Book 2038 Page 39.

This Indenture. Made this Twenty-third (23) day of February, A. D. 1940,

Between Court Holding Company a corporation existing under the laws of the State of Florida having its principal place of business in the County of Dade State of Florida, party of the first part, and Louis Miller and Minnie Miller of the County of Dade and State of Florida parties of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of $10. & OG & VC Dollars, to it in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said parties of the second part, and their heirs and assigns forever, all that certain parcel of land lying and being in the County of Dade and State of Florida, more particularly described as follows:

Lots 3, 4 and 5 of Block 46 of Ocean Beach Addition Number 3, as per plat thereof, recorded in Plat Book 2, page 81, of the Public Records of Dade County, Florida, together with all improvements thereon and all furniture, furnishings and equipment located in the building or buildings on said premises, as well as the furniture, furnishings and equipment located on said property belonging to the Grantor; the said property being known as Mayfield Court Apartments, and situate on the aforesaid real estate.

Subject to all restrictions and limitations appearing of record, easements for the use of public utilities appearing of record, zoning ordinances of the City of Miami Beach, Florida, taxes for the year 1940, and that certain first mortgage executed between the grantor herein to Jefferson Standard Life Insurance Company, a North Carolina Corporation, dated February 5, 1937, and filed for record on February 18, 1937 in Mortgage Book 1039, page 187 of the Public Records of Dade County, Florida, which mortgage was in the principal sum of $37,500. and which said mortgage has been reduced to the sum of $30,000.00, together with interest from August 5, 1939; and further subject to the second mortgage executed by the Court Holding Company to Carrie Rosen in the sum of $7,500.00 dated January 24, 1940 and filed for record on the same date, under Clerk's File No. N-3782 of the Public Records of Dade County, Florida, which mortgage is still in the principal sum of $7,500.00 with interest from said date.

Together with all the tenements, hereditaments and appurtenances, with every privilege, right, title, interest and estate, reversion, remainder and easement thereto belonging or in anywise appertaining:

To Have and to Hold the same in fee simple forever.

And the said party of the first part doth covenant with the said parties of the second part that it is lawfully seized of the said premises; that they are free of all incumbrances, and that it has good right and lawful authority to sell the same; and the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever.

In Witness Whereof, the said party of the first part has caused these presents to be signed in its name by its President, and its corporate seal to be affixed, attested by its Secretary, the day and year above written.

(Corporate Seal)

COURT HOLDING COMPANY,
By LOUIS MILLER,
President.

Attest:
HARRY A. MILLER,
Secretary.

Signed, Sealed and Delivered in Our Presence:
HERBERT N. SCHWARTZ,
OTTO F. WEBER.

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State of Florida.

County of Dade

I HEREBY CERTIFY, *That on this* 23rd *day of* February *A. D. 19*40, *before me personally appeared* Louis Miller *and* Harry A. Miller, *respectively President and* Secretary *of* Court Holding Company, *a corporation under the laws of the State of* Florida, *to me known to be the persons described in and who executed the foregoing conveyance to* Louis Miller and Minnie Miller *and severally acknowledged the execution thereof to be their free act and deed as such officers, for the uses and purposes therein mentioned; and that they affixed thereto the official seal of said corporation, and the said instrument is the act and deed of said corporation.*

WITNESS *my signature and official seal at* Miami *in the County of* Dade *and State of Florida, the day and year last aforesaid.*

My Commission Expires 6/24/43 — Mildred Werner, *Notary Public*

CANCELLED FEB 26 19… E. B. L.

Warranty Deed

FROM CORPORATION

Court … TO Mil…

Date

ABSTRACT OF DESCRIPTION

STATE OF FLORIDA,
County of DADE

On this 26 *day of* … *A. D. 194*0, *at* … *o'clock* … *m. this instrument was filed for record, and being duly acknowledged and proven, I have recorded the same on pages* 39 *of Book* 2038 *in the public records of said County.*

In Witness Whereof, *I have hereunto set my hand and affixed the seal of the Circuit Court of the* 11th *Judicial Circuit of said State in and for said County.*

E. B. Leatherman, *Clerk*

…, D. C.

HART & RILEY … MIAMI, FLORIDA

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55 PETITIONER'S EXHIBIT 5.

The Tax Court of the U. S., Div. 4, Docket 111075.
Admitted in Evidence Jan. 21, 1943.

Memorandum Agreement and Deposit Receipt.

This is to acknowledge receipt by the undersigned Louis Miller and Minnie Miller, his wife, hereinafter referred to as the Vendors, of the sum of One Thousand ($1,00.00) Dollars, from Margaret W. Fine, hereinafter referred to as the Purchaser, as a deposit on account of the purchase prcie of the following described property in Dade County. Florida, to-wit:

Lots 3, 4 and 5 of Block 46 of Ocean Beach Addition Number 3, as per plat thereof, recorded in Plat Book 2, page 81, of the Public Records of Dade County, Florida. together with all improvements thereon and all furniture, furnishings and equipment located in the building or buildings on said premises, as well as the furniture. furnishings and equipment, located on said property belonging to the Vendor; the said property being known as Mayfield Court Apartments, and situate on the afore said real estate.

It is specifically understood and agreed that the aforesaid sum of One Thousand ($1,000.00) Dollars, shall be applied as a part of the purchase price of said property subject to the terms and conditions of this agreement.

It is understood and agreed that the total purchase price for said property is Fifty-Four Thousand Five Hundred ($54,500.00) Dollars, of which the aforesaid sum of One Thousand ($1,000.00) Dollars hereby acknowledged, shall be and is a part. The balance of said purchase price shall be paid as follows, to-wit:

1. $12,500.00 in cash concurrently with the closing of the transaction which closing shall take place as more specifically herein provided for.

2. $28,500.00 by taking title subject to the balance of unpaid principal on an existing first mortgage encumbering the above described property given by the Vendors to Jefferson Standard Life Insurance Company to secure an original principal indebtedness of $37,500.00, on which original indebtedness there will be an unpaid balance of principal in said amount of $28,500.00 at the date of the closing of the transaction and which said balance is payable as follows: $855.00 on August 5th, 1940, and the like sum of $855.00 semi-annually thereafter to and including August 5th, 1946; and the balance of $17,385.00 then remaining unpaid on February 5th, 1947; which unpaid balance of principal on said first mortgage bears interest at the rate of six (6%) per cent per annum, interest payable semi-annually on the 5th day of February and the 5th day of August of each year.

3. $7,500.00 by accepting title subject to an existing second mortgage encumbering the above described property given by the Vendor to Carrie Rosen to secure an indebtedness of $7,500.00 payable as follows: $750.00 on May 1st, 1940; $750.00 on May 1st, 1941; and the balance of $6,000.00 on May 1st, 1942, together with interest on the balance of principal remaining from time to time unpaid at the rate of eight (8%) per cent per annum, interest payable semi-annually.

4. $5,000.00 balance (less deductions for credits due the Purchaser at closing, as hereinafter provided for), payable on August 15th, 1940, together with interest thereon at the rate of six (6%) per cent per annum from date of closing; said deferred balance to be evidenced by a promissory note and secured by a third mortgage

upon the above described property in the form of promissory notes and mortgage deeds usually employed in Dade County, Florida, in real estate transactions.

It is specifically understood and agreed that the Vendors shall furnish an abstract of title within ten (10) days from date, brought down to a date not earlier than the date of this contract, showing their title to the above described property to be good, marketable and insurable, subject only to the matters herein referred to. Delivery of said abstract may be made by delivering the same to Stanley C. Myers, attorney for the Purchaser.

In the event title shall be found good, marketable and insurable, subject only to the matters herein mentioned, the transaction shall be closed on or before thirty (30) days after the delivery of the abstract to the Purchaser, at which time the parties shall execute all of the documents and instruments required of them in connection with the closing, and the Purchaser shall pay the cash portion of the purchase price as herein agreed.

In the event Vendors' title shall not be found good, marketable and insurable, subject only to the matters herein mentioned, the Vendors shall have thirty (30) days time within which to make said title good, marketable and insurable and in the event said title cannot be made good, marketable and insurable within said period of time, the deposit of $1,000.00 hereby acknowledged shall be forthwith returned to the Purchaser and concurrently therewith the Purchaser shall return the abstract of title to the Vendors, together with her executed unrecorded copy of this agreement, and both parties thereupon shall be immediately relieved from any further liability hereunder.

If title to the said property shall be found good, marketable and insurable and the Purchaser shall fail to consummate the transaction or pay the balance of the purchase price as herein provided for, then and in that event the deposit of $1,000.00 shall be retained by the Vendor as liquidated and agreed damages for the failure of the Purchaser to comply with the terms of this agreement.

It is specifically understood and agreed as follows:

1. The Vendors shall convey a good, marketable and insurable title to the above described property by absolute warranty deed and absolute bill of sale, and said property and the title thereto shall be subject only to restrictions and limitations appearing of record (without reverter, however); easements for the use of public utilities appearing of record; zoning ordinances of the City of Miami Beach, Florida; the first mortgage of $28,500.00 and the second mortgage of $7,500.00 above referred to; taxes for the year 1940 and subsequent years; and right of lessee in possession under lease covering the entire premises terminating October 1, 1940.

2. Certified municipal liens shall be paid by the Vendors. Pending municipal liens shall be assumed by the Purchaser.

3. Pro-rations:

(a) Taxes, insurance, interest on mortgages and other expenses of the property shall be prorated as of the date of closing.

(b) There shall be no pro-rations of current rents; however, it is specifically understood and agreed that

the Lessee in possession of the above described property has deposited the sum of $2,000.00 with the Vendors under the terms of her existing lease, as pre-paid rent or as security, or otherwise and that the Purchaser is to receive credit for such deposit of $2,000.00 against the purchase price upon the closing of the transaction.

(c) All credits due to Purchaser or Vendor, as the case may be, by reason of pro-rations or adjustments made between the parties upon the closing of the transaction shall be credited to or charged against the deferred balance of the purchase price in the amount of $5,000.00 to be paid on August 15th, 1940, and the amount of such deferred balance shall be reduced or increased accordingly; it being the intention and agreement of the parties that the Purchaser shall pay at the closing the sum of $12,500.00 in cash (in addition to the deposit of $1,000.00 hereby acknowledged).

It is further understood and agreed by and between the parties that prior to the execution of this agreement the Purchaser has made her own inspection of the furniture, furnishings and equipment located in the building and it is understood that the furniture, furnishings and equipment herein agreed to be sold are those furniture, furnishings and equipment now located in and upon the above described real property; however, it is agreed that for the purpose of transferring title to said personal property, a specific inventory thereof shall be taken and shall be appropriately identified by the parties at the time of the closing of the transaction.

The Vendors agree to sell and the Purchaser agrees to purchase the property hereinabove described for the purchase price and according to the terms, conditions, stipulations and agreements in this instrument contained.

This agreement shall be binding on, and shall ensue to the benefit of the respective successors, heirs, executors, administrators and assigns of the parties hereto for all purposes hereof. The Purchaser shall have the right to assign this contract and all of her rights hereunder without the consent of the Vendor.

In Witness Whereof, the undersigned parties have hereunto duly and properly executed this instrument at Miami, Dade County, Florida, this 26th day of February, A. D. 1940.

LOUIS MILLER, (Seal)
MINNIE MILLER, (Seal)
Vendors.
MARGARET W. FINE (Seal)
Purchaser.

Signed, sealed and delivered in the presence of:
STANLEY C. MYERS,
HERBERT N. SCHWARTZ,
As to both.

The undersigned, Abe C. Fine, joins in the execution of the foregoing agreement as the husband of Margaret W. Fine, the Purchaser therein named and to validate the signature of such Purchaser.

ABE C. FINE. (Seal)

State of Florida,
County of Dade. ss.

I Hereby Certify that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Louis Miller and Minnie Miller, to me well known to be the persons described in and who executed the foregoing instrument, and acknowledged before me that they executed the same

freely and voluntarily for the purposes therein expressed.

And I Further Certify that the said Minnie Miller, known to me, to be wife of the said Louis Miller, on a separate and private examination taken and made by and before me, separately and apart from her said husband, did acknowledge that she made herself a party to said instrument for the purpose of renouncing, relinquishing and conveying all her right, title and interest, whether dower, homestead or of separate property, statutory or equitable, in and to the lands described therein, and that she executed the said instrument freely and voluntarily and without any compulsion, constraints, apprehension or fear of or from her said husband.

Witness my hand and official seal at Miami, Dade County, Florida, this 26 day of February, A. D. 1940.

LILLIAN A. LEWIS,
Notary Public, State of Florida
at Large.

My commission expires Feb. 12, 1943.

State of Florida,
County of Dade. ss.

I Hereby Certify that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Margaret W. Fine, to me well known to be the person described in and who executed the foregoing instrument, and acknowledged before me that she executed the same freely and voluntarily for the purposes therein expressed.

LILLIAN A. LEWIS,
Notary Public, State of Florida
at Large.

My commission expires Feb. 12, 1943.

60 PETITIONER'S EXHIBIT 6.

The Tax Court of the U. S., Div. 4, Docket 111075. Admitted in Evidence Jan. 21, 1943.

Closing Statement—April 1, 1940.

Lots 3, 4, & 5, Block 46 Ocean Beach Addition No. 3.

Louis Miller and Minnie Miller, Sellers.

Margaret W. Fine, Purchaser.

	Cr. Buyer	Cr. Seller
Purchase Price		$54,500.00
Cash heretofore paid	$ 1,000.00	
Cash paid at closing	12,500.00	
By assumption of first mortgage to Jefferson Standard Life Insurance Company:		
Principal as of 4/1/40	28,500.00	
Interest from 2/5/40 to 4/1/40	257.67	
Second mortgage to Carrie Rosen:		
Principal	7,500.00	
Interest at 10% 1/24/40 to 4/1/40 (2 mo. & 7 days)	139.58	
Interest—2% on decreasing principal from 4/1/40 to 5/1/42, due to 10% in mtge. & 8% in contract	257.50	

Taxes pro-rated:		
Real property:		
State & County 1940 (1/1 to 4/1)	163.19	
City of Miami Beach 1940, (1/1 to 4/1)	155.93	
Personal Property:		
State & County 1940.....	....	
City of Miami 1940.....	14.80	
Assessments: Lien H-174:		
Principal	681.10	
Interest 11/13/37 to 4/1/40 (2 yrs. 4 mo. 18 days—14.2%)	96.72	
Security Deposit on Feiwish Lease	2,000.00	
Pro-ratum of Insurance Premiums..		697.60
Amount of Third Purchase Money Mortgage	1,931.11	
Total	$55,197.60	$55,197.60

In connection with the above closing, the amount of $12,-500.00 in cash paid by the Buyer at closing was made up in the following manner: $2,525.00 in cash which had heretofore been paid by the Buyer to the Seller since the date of the preliminary agreement and deposit receipt dated February 26th, 1940, and the balance of $9,975.00 at the closing. The latter sum of $9,975.00 has been deposited by the Sellers with Stanley C. Myers, as Escrow Agent, for the purpose of holding said sum of money for the period of time that it takes to record all closing documents and bring the abstract to date showing no change in the title since last examination by Purchaser's attorney other than

closing documents and corrective instruments. Out of the net cash at closing the Escrow Agent is authorized to pay the following cash items to clear Sellers' title and to pay for his closing expenses:

State and County 1939 taxes	$652.76
City of Miami Beach 1939 taxes	623.70
All intangible taxes shown in Opinion of Title	181.36
All personal property taxes against furnishings	85.35
Documentary stamps on deed	37.00

Accepted this April 1, 1940.

LOUIS MILLER,
For Seller.
STANLEY C. MYERS,
Atty. for Buyer.

The undersigned acknowledged receipt of checks aggregating $9,975.00, representing net cash paid by the Buyer at closing held in escrow as set forth in the above closing statement.

STANLEY C. MYERS.
Escrow Agent.

Computation of Insurance.

Pro-Rations.

Company	Amount	Kind
National Union Fire, Dated 2/25/40, Expires 2/25/45—		
On Building	$26,250.00	Fire
	18,000.00	Windstorm

On Furnishings	3,750.00	Fire
	2,625.00	Windstorm
New Brunswick, Dated 2/25/40, Expires 2/25/40—		
On Building	26,250.00	Fire
	18,000.00	Windstorm
On Furnishings	3,750.00	Fire
	2,625.00	Windstorm

Total Premiums for above policies	$2,986.80
Paid by Owner to date	746.70
Balance of Premiums due	$2,240.10
Credit for prepaid premiums due Owner as of 4/1/40	$697.60

Form 1120
Treasury Department
Internal Revenue Service

UNITED STATES CORPORATION INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAX RETURN 1940

For Calendar Year 1940

or fiscal year beginning ..., 1940, and ended ..., 1941

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

TURF HOLDING COMPANY
(Name)

11075 113th Ocean Drive
(Street and number)

Miami Beach | Dade | Florida
(Post office) | (County) | (State)

Kind of business: Owners of Mayfield Court Apartments

Corporation in complete liquidation during the year

File No. 155
Serial No. 653652
Audited by Florida

Code | Check | M.O.

NORMAL-TAX NET INCOME COMPUTATION

Item No.				
	GROSS INCOME			
1.	Gross sales (where inventories are an income-determining factor) $; Less: Returns and allowances $		$	
2.	Less: Cost of goods sold. (From Schedule A)			
3.	Gross profit from sales		$	
4.	Gross receipts (where inventories are not an income-determining factor) $			
5.	Less: Cost of operations. (From Schedule B)			
6.	Gross profit where inventories are not an income-determining factor			
7.	Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 17-(1))			
8.	Interest on obligations of the United States. (From Schedule M, line 15 (c) (4).) (See Instruction 17-(2))			
9.	Rents. (See Instruction 18)		P.175	00
10.	Royalties. (See Instruction 19)			
11.	(a) Net short-term capital gain. (From Schedule C)			
	(b) Net long-term capital gain (or loss). (From Schedule C)		0	
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)			
12.	Dividends. (From Schedule E)			
13.	Other income. (State nature)			
14.	Total income in items 3, and 6 to 13, inclusive		$	P.175 00
	DEDUCTIONS			
15.	Compensation of officers. (From Schedule F)	$ 500	00	
16.	Salaries and wages (not deducted elsewhere)			
17.	Rent. (See Instruction 21)			
18.	Repairs. (See Instruction 22)			
19.	Bad debts. (From Schedule G)			
20.	Interest. (See Instruction 24)	625	20	
21.	Taxes. (From Schedule H.) (Report declared value excess-profits tax as item 31)	562	25	
22.	Contributions or gifts paid. (From Schedule I)			
23.	Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule; see Instruction 27)			
24.	Depreciation. (From Schedule J)	738	33	
25.	Depletion of mines, oil and gas wells, timber, etc. (Submit schedule; see Instruction 29)			
26.	Net operating loss deduction. (Submit statement; see Instruction 30)			
27.	Amortization. (Submit schedule; see Instruction 31)			
28.	Other deductions authorized by law. (From Schedule K)	1,591	13	
29.	Total deductions in items 15 to 28, inclusive			
30.	Net income for declared value excess-profits tax computation (item 14 minus item 29)			
31.	Less: Declared value excess-profits tax. (See Instruction 33)			
32.	Net income			
33.	Less: Interest on obligations of the United States (item 8, above)			
34.	Adjusted net income			
35.	Less: Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 34, above)			
36.	Normal-tax net income			

TOTAL INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAXES

37.	Total income and income defense taxes (line 25, page 2)	$ 30 50	
38.	Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation. (See Instruction 37)		
39.	Balance of income and income defense taxes		
40.	Total declared value excess-profits and declared value excess-profits defense taxes (line 10, page 2)		
41.	Total income, declared value excess-profits, and defense taxes due		

NORMAL-TAX NET INCOME COMPUTATION

Item No.				
	GROSS INCOME			
1.	Gross sales (where inventories are an income-determining factor) $; Less: Returns and allowances $		$	
2.	Less: Cost of goods sold. (From Schedule A)			
3.	Gross profit from sales		$	
4.	Gross receipts (where inventories are not an income-determining factor) $			
5.	Less: Cost of operations. (From Schedule B)			
6.	Gross profit where inventories are not an income-determining factor			
7.	Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 17-(1))			
8.	Interest on obligations of the United States. (From Schedule M, line 15 (a) (4).) (See Instruction 17-(2))			
9.	Rents. (See Instruction 18)	2,175	00	
10.	Royalties. (See Instruction 19)			
11.	(a) Net short-term capital gain. (From Schedule C)			
	(b) Net long-term capital gain (or loss). (From Schedule C)			
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)			
12.	Dividends. (From Schedule E)			
13.	Other income. (State nature)			
14.	Total income in items 3, and 6 to 13, inclusive			$ 2,175
	DEDUCTIONS			
15.	Compensation of officers. (From Schedule F)	$ 500	00	
16.	Salaries and wages (not deducted elsewhere)			
17.	Rent. (See Instruction 21)			
18.	Repairs. (See Instruction 22)			
19.	Bad debts. (From Schedule G)			
20.	Interest. (See Instruction 24)	85	20	
21.	Taxes. (From Schedule H.) (Report declared value excess-profits tax on item 31)	49	21	
22.	Contributions or gifts paid. (From Schedule I)			
23.	Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule; see Instruction 27)			
24.	Depreciation. (From Schedule J)	338	33	
25.	Depletion of mines, oil and gas wells, timber, etc. (Submit schedule; see Instruction 28)			
26.	Net operating loss deduction. (Submit statement; see Instruction 30)			
27.	Amortization. (Submit schedule; see Instruction 31)			
28.	Other deductions authorized by law. (From Schedule K)	1,501	33	
29.	Total deductions in items 15 to 28, inclusive			
30.	Net income for declared value excess-profits tax computation (item 14 minus item 29)			
31.	Less: Declared value excess-profits tax. (See Instruction 33)			
32.	Net income			
33.	Less: Interest on obligations of the United States (item 8, above)			
34.	Adjusted net income			
35.	Less: Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 34, above)			
36.	Normal-tax net income			
	TOTAL INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAXES			
37.	Total income and income defense taxes (line 35, page 2)	$ 2088		
38.	Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation. (See Instruction 37)			
39.	Balance of income and income defense taxes			
40.	Total declared value excess-profits and declared value excess-profits defense taxes (line 10, page 3)			
41.	Total income, declared value excess-profits, and defense taxes due			

AFFIDAVIT. (See Instruction 8)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this _____ day of _____, 194__

NOTARIAL SEAL

_____ _____ _____

(Signature of officer administering oath) (Title)

CORPORATE SEAL

_____

(Treasurer or other principal officer)

_____

(President, Assistant Treasurer, or Chief Accounting Officer)

AFFIDAVIT. (See Instruction 8)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person by whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 26th day of March, 194 1

NOTARIAL SEAL

M. Graves Notary

(Signature of officer administering oath) (Title)

_____

(Address of person preparing the return)

_____

(Signature of person preparing the return)

Robert L. Thompson

(Name of firm, or employer, if any)

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and ACCURATELY.

1

C1

DECLARED VALUE EXCESS-PROFITS AND DECLARED VALUE EXCESS-PROFITS DEFENSE TAX COMPUTATION. (See Instruction 34)

	Column 1	Rate	Column 2 Amount of Tax
1. Net income for declared value excess-profits tax computation (item 30, page 1)	$ 1,491 94		
2. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1943 (or for year ended June 30, 1941, if your income tax fiscal year began in 1940 and ended on or after July 31, 1941)	$ 28,000 00		
3. 10 percent of line 2	$ 2,800 00		
4. Dividends received credit (85 percent of column 2, Schedule K, but not in excess of 60 percent of item 34, page 1)	2,799 06		
5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	$ None		
6. Amount taxable at 6 percent (5 percent of line 5, but not more than line 5); and tax		6%	$ None
7. Balance taxable at 12 percent (line 5 minus line 6, column 1); and tax	$	12%	
8. Total declared value excess-profits tax (total of line 6, column 2, and line 7, column 2)			$
9. Declared value excess-profits defense tax (10 percent of line 8)			
10. Total declared value excess-profits and declared value excess-profits defense taxes			$

INCOME AND INCOME DEFENSE TAX COMPUTATION. (See Instructions 35 and 36)

11. Normal-tax net income (item 28, page 1)	$ 1,491 94		
12. Portion of line 11 (not in excess of $5,000); and tax at 15.5 percent	$ None	15.5%	$ None
13. Portion of line 11 (in excess of $5,000 and not in excess of $25,000); and tax at 15 percent		15%	
14. Portion of line 11 (in excess of $25,000); and tax at 17 percent		17%	
15. Total income tax (total tax in column 2 of lines 12, 13, and 14)			$ None
16. Income defense tax (10 percent of line 15)			$
CORPORATIONS WITH NORMAL-TAX NET INCOMES OF MORE THAN $25,000 AND LESS THAN $50,000. (See Instruction 35-(b))			
17. Normal-tax net income (item 28, page 1)	$		
18. Portion of line 17 in the amount of $25,000; and tax	$ 25,000 00	30%	$ 23,771 00
19. Total income tax (total tax in column 2 of lines 16 and 18)			$
20. Income defense tax:			
(a) If line 17 is less than $31,944.20 ($777.20 plus 2.5 percent of line 19, column 1)			$
(b) If line 17 is $31,944.20 or more (1.9 percent of line 17)			$
CORPORATIONS WITH NORMAL-TAX NET INCOMES OF $50,000 OR MORE. (See Instruction 35-(c))			
21. Normal-tax net income (item 28, page 1)	$		
22. Income tax (22.1 percent of line 21)		22.1%	$
23. Income defense tax (1.9 percent of line 21)			$
SPECIAL CLASSES OF CORPORATIONS NOT SUBJECT TO DECLARED DEFENSE TAX RATES. (See Instruction 35)			
(I) Foreign Corporations Engaged in Business Within United States. (See Instruction 35-(d))			
24. Normal-tax net income (item 28, page 1)	$		
25. Income tax (22.1 percent of line 24)		22.1%	$
26. Income defense tax (1.9 percent of line 24)			$
(II) Mutual Investment Companies. (See Instruction 35-(d))			
27. Adjusted net income (not including net operating loss deduction) (item 34, page 1, plus item 28, page 1)	$		
28. Less: Basic surtax credit. (Submit schedule)	$		
29. Balance subject to income tax			
30. Income tax (22.1 percent of line 29)		22.1%	$ 0
31. Income defense tax (1.9 percent of line 29)			$
32. Total income tax (line 15, 19, 23, 25, or 30, above, whichever is applicable)			$ 0
33. Total income defense tax (line 16, 21(a), 21(b), 24, 27, or 31, above, whichever is applicable)			
34. Total income and income defense taxes			$

Schedule A—COST OF GOODS SOLD. (See Instructions 16)

(Where inventories are not an income-determining factor)

Inventory at beginning of year	$	
Material or merchandise bought for manufacture or sale		
Salaries and wages		
Other costs per books. (Attach itemized schedule)		
Total	$	
Less: Inventory at end of year		
Cost of goods sold (enter as item 3, page 1)	$	

Schedule B—COST OF OPERATIONS

(Where inventories are not an income-determining factor)

Salaries and wages	$
Other costs (to be detailed):	
(a)	
(b)	
(c)	
(d)	
(e)	
Total (enter as item 4, page 1)	$

Schedule C—CAPITAL GAINS AND LOSSES. (See Instruction 29)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (Contract price)	4. Cost or Other Basis	5. Expense of Sale and Cost of Improvements Subsequent to Acquisition, either or March 1, 1913	6. Depreciation Allowed (or allowable) from Acquisition or March 1, 1913 (Fireside Article)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR NOT MORE THAN 18 MONTHS						
		$	$	$	$	$
Total net short-term capital gain (or loss). (Enter as item 11 (a), page 1, amount of gain. No net loss allowable)						$

4. ... but not in excess of 10 percent of item 24, page 1) | 2,200 00

5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4) | $ none
6. Amount taxable at 6 percent (5 percent of line 2, but not more than line 5); and tax | 6% | $ none
7. Balance taxable at 12 percent (line 5 minus line 6, column 1); and tax | $ | 12%
8. Total declared value excess-profits tax (total of line 6, column 2, and line 7, column 2) | $ none
9. Declared value excess-profits defense tax (10 percent of line 8) | none
10. Total declared value excess-profits and declared value excess-profits defense taxes | $ none

INCOME AND INCOME DEFENSE TAX COMPUTATION. (See Instructions 25 and 26)

CORPORATIONS WITH NORMAL-TAX NET INCOME OF NOT MORE THAN $25,000. (See Instruction 25-(1))

	Column 1		Rate	Column 2
11. Normal-tax net income (item 25, page 1)	$ 1,491	94		
12. Portion of line 11 (not in excess of $5,000); and tax at 12.5 percent	$ none		12.5%	$ none
13. Portion of line 11 (in excess of $5,000 and not in excess of $20,000); and tax at 15 percent			15%	
14. Portion of line 11 (in excess of $20,000); and tax at 17 percent			17%	
15. Total income tax (total tax in column 2 of lines 12, 13, and 14)				$ none
16. Income defense tax (10 percent of line 15)				$

CORPORATIONS WITH NORMAL-TAX NET INCOME OF OVER $25,000 AND NOT OVER $31,964.30. (See Instruction 25-(2))

	Column 1		Rate	Column 2
17. Normal-tax net income (item 25, page 1)	$			
18. Portion of line 17 in the amount of $25,000; and tax	$ 25,000	00		$3,775 00
19. Portion of line 17 (in excess of $25,000); and tax at 36 percent			36%	
20. Total income tax (total tax in column 2 of lines 18 and 19)				$
21. Income defense tax:				
(a) If line 17 is less than $31,964.30 ($377.50 plus 8.1 percent of line 19, column 1)				$
(b) If line 17 is $31,964.30 or more (1.9 percent of line 17)				$

CORPORATIONS WITH NORMAL-TAX NET INCOME OF $31,964.30 OR MORE. (See Instruction 25-(3))

	Column 1		Rate	Column 2
22. Normal-tax net income (item 25, page 1)	$			
23. Income tax (22.1 percent of line 22)			22.1%	$
24. Income defense tax (1.9 percent of line 22)				$

SPECIAL CLASSES OF CORPORATIONS NOT SUBJECT TO GRADUATED INCOME TAX RATES. (See Instruction 26)

(I) Foreign Corporations Engaged in Business Within United States. (See Instruction 26-(3))

	Column 1		Rate	Column 2
25. Normal-tax net income (item 25, page 1)	$			
26. Income tax (22.1 percent of line 25)			22.1%	$
27. Income defense tax (1.9 percent of line 25)				$

(II) Mutual Investment Companies. (See Instruction 26-(4))

	Column 1		Rate	Column 2
28. Adjusted net income (not including net operating loss deduction) (item 24, page 1, plus item 16, page 1)	$			
29. Less: Basic surtax credit. (Submit schedule)				
30. Balance subject to income tax	$			
31. Income tax (22.1 percent of line 30)			22.1%	$
32. Income defense tax (1.9 percent of line 30)				$
33. Total income tax (line 15, 20, 23, 26, or 31, above, whichever is applicable)				$ none
34. Total income defense tax (line 16, 21(a), 21(b), 24, 27, or 32, above, whichever is applicable)				none
35. Total income and income defense taxes				$ none

Schedule A.—COST OF GOODS SOLD. (See Instruction 16)
(Where inventories are an income-determining factor)

Inventory at beginning of year	$
Material or merchandise bought for manufacture or sale	
Salaries and wages	
Other costs per books. (Attach itemized schedule)	
Total	$
Less: Inventory at end of year	
Cost of goods sold (enter as item 2, page 1)	$

Schedule B.—COST OF OPERATIONS
(Where inventories are not an income-determining factor)

Salaries and wages	$
Other costs (to be detailed):	
(a)	
(b)	
(c)	
(d)	
(e)	
Total (enter as item 3, page 1)	$

Schedule C.—CAPITAL GAINS AND LOSSES. (See Instruction 20)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (contract price)	4. Cost or Other Basis	5. Expense of Sale and Cost of Improvements Subsequent to Acquisition or March 1, 1913	6. Depreciation Allowed (or allowable) Since Acquisition or March 1, 1913 (Furnish details)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR NOT MORE THAN 18 MONTHS						
		$	$	$	$	$
Total net short-term capital gain (or loss). (Enter as item 11 (a), page 1, amount of gain. No net loss allowable)						$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS						
		$	$	$	$	$
Total net long-term capital gain (or loss). (Enter as item 11(b), page 1)						$

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 20)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (Contract price)	4. Cost or Other Basis	5. Expense of Sale and Cost of Improvements Subsequent to Acquisition or March 1, 1913	6. Depreciation Allowed (or allowable) Since Acquisition or March 1, 1913 (Furnish details)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss). (Enter as item 11 (c), page 1)						$

Supplemental information required for Schedules C and D

State with respect to each item of property reported in Schedules C and D: (1) how property was acquired ....
(2) whether at time of sale or exchange (a) purchaser owned directly or indirectly more than 50 percent in value of your outstanding stock, (b) whether purchaser was a corporation, more than 50 percent in value of its capital stock and 50 percent in value of your capital stock was owned directly or indirectly by or for the same individual or his family, and (c) where purchaser was a corporation, whether more than 50 percent in value of its capital stock was owned directly or indirectly by you .... If so, state name and address of purchaser ....

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1940 RETURN of CAPITAL-STOCK TAX

For Year Ending June 30, 1940

DOMESTIC CORPORATIONS

(Chapter 6, Internal Revenue Code, as amended)

This return must be filed, in triplicate, and received with remittance by the Collector for your district on or before July 31, 1940. (See instructions 20, page 16.)

Form 707

AUG 1 1940

COLLECTOR OF INTERNAL REVENUE
DISTRICT OF FLORIDA.

To be stamped above by Collector, showing date and time received

Aug. 1940

1. Name Smart Building Co.

2. Address 1639 Pennsylvania Ave., Miami Beach, Florida
(The address must be that of the principal place of business. Give "street and number," "city or town," and "State")

3. Incorporated or organized in State of Florida Month May Day 21 Year 1936

4. Was a 1939 capital-stock tax return filed? yes. Name under which filed. (If different, attach statement explaining fully.) same name (District Florida)

5. Date of close of last income-tax year ended prior to July 1, 1940 December 31, 1939 Was an income-tax return filed for that year? yes. Name under which filed same name (District Florida)
If the corporation is newly organized and has not established an income-tax year, state date of organization

6. Nature of business in detail real estate and rentals from same

7. Name of parent company, if any does not apply (District)

8. Name of subsidiary, if any does not apply No. shares held (District)
(If more than one, attach list and state number owned by parent. Also districts where filed)

9. DECLARED VALUE OF CAPITAL STOCK $
Corporations enumerated in instruction 10 on page 10 must report a definite and unqualified declared value in this block. (See also instructions 11 to 13.) (Do not use this block for elective declaration year—see block 10 below.)

10. ADJUSTED VALUE—ELECTIVE DECLARED VALUE
Corporations described in instruction 5 on page 9 MUST complete Schedules I and II and enter the adjusted value (last item in Schedule I) in Part A of this block. Any corporation of this class may elect to declare, and pay tax on, a value in excess of the adjusted value. If such election is made, a definite and unqualified value MUST be entered in Part B of this block. (See instructions 14 and 15.)

Part A ADJUSTED VALUE OF CAPITAL STOCK (Last item of Schedule I, page 9)	Part B ELECTIVE DECLARED VALUE OF CAPITAL STOCK (Any amount declared below must be a amount of adjusted value determined by Schedule I)
$ 20,804.55	$

11. EXEMPTIONS.—The law provides for exemption from the tax only on the ground indicated below. Corporations claiming exemption must (1) complete block 9 or 10 above whichever is applicable, (2) check the appropriate space below, and (3) submit with the return the evidence specified under the block checked.

☐ Corporation exempt from income tax under section 101, Internal Revenue Code. Furnish information required by instruction 17.

☐ Insurance company subject to tax under section 201, 204, or 207, Internal Revenue Code. State which section

☐ Corporation not doing business. Furnish information required by instruction 19.

Computation of Tax	For Use of Taxpayer	For Use of Department
12. Taxable value reported in item 9 or 10	$ 20,804.55	$
13. Tax at rate of $1 for each full $1,000 in item 12 (omit cents)	22 00	
14. Penalty of ____ percent for delinquency in filing return	-	
15. Interest at 6 percent per annum	-	
16. Total tax, penalty, and interest	22 00	

DUPLICATE

Schedule E.—INCOME FROM DIVIDENDS

1. Name and Address of Paying Corporation	2. Domestic Corporations Taxable under Chapter 1, Internal Revenue Code		3. Foreign Corporations		4. Other Corporations	
	$		$		$	
Totals	$		$		$	
Total of columns 2, 3, and 4 (Enter as item 12, page 1)						

*Exempt dividends received from corporations organized under the China Trade Act, 1922, and corporations entitled to the benefits of section 251 of the Internal Revenue Code, which dividends should be entered in column 4.

Schedule F.—COMPENSATION OF OFFICERS

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Percentage of Corporation's Stock Owned: 4. Common	5. Preferred	6. Amount of Compensation	
Minnie Miller-[illegible] Ocean Dr., Miami Beach	President	[illegible]			$ [illegible]	[illegible]
Total compensation of officers (Enter as item 15, page 1)					$	

NOTE.—Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of $75,000 was paid to any officer or employee.

Schedule G.—BAD DEBTS. (See Instruction 23) (See note 1)

1. Taxable Year	2. Net Income Reported		3. Sales on Account		4. Bad Debts Charged Off by Corporation if No Reserve is Carried on Books (See note 2)		If Corporation Carries a Reserve: 5. Gross Amount Added to Reserve		6. Amount Charged Against Reserve	
1936	$		$		$		$		$	
1937										
1938. (See note 3)										
1939. (See note 3)										
1940. (See note 3)										

1. Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.
2. Not including securities which are capital assets ascertained to be worthless and charged off within the taxable year. Such securities charged off within the year covered by this return should be reported in Schedule C.

Schedule H.—TAXES. (See Instruction 25)

Nature	Amount	
Real estate	$ 32[illegible]	12
Personal property	14	[illegible]
Intangible personal property	[illegible]	[illegible]
Documentary stamps	37	00
Capital stock taxes	32	[illegible]
Total (Enter as item 21, page 1) 544	$ [illegible]	[illegible]

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 26)

Name and Address of Organization	Amount	
	$	
Total (Enter as item 22, page 1, subject to 5 percent limitation). (See Instruction 26)	$	

Schedule J.—DEPRECIATION. (See Instruction 28)

1. Kind of Property (if buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)		4. Assets Fully Depreciated in Use at End of Year		5. Depreciation Allowed (or allowable) in Prior Years		6. Remaining Cost or Other Basis to be Recovered		7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year	
Apt. Building	Aug [illegible]	$ 30,057	28	$ none		$ 6,292	71	$ 23,764	57	25 yrs	20yr	$ [illegible]	[illegible]
Furniture	various	[illegible]	[illegible]	[illegible]	50	-		-		5 yrs			
Refrigerators	12-31-37	1,[illegible]	00	none		535	70	1,134	30	10 yrs	7yrs	41	[illegible]
Total (Enter as item 24, page 1)												$ 322	33

Schedule K.—OTHER DEDUCTIONS. (See Instruction 33)

Insurance, [illegible]; Repairs, [illegible]; Supplies, [illegible]; Unabsorbed loan costs, $1,427.[illegible]; Total $1,[illegible].13

This corporation declared a dividend [illegible] in complete liquidation of all of its assets to its stockholder on February 23, [illegible]. The property was sold on April 1, 1940, the corporation collecting the rents to the date of sale by the stockholder only

Total of columns 2, 3, and 4. (Enter as item 12, page 1) ... $

*Except dividends received from corporations organized under the China Trade Act, 1922, and corporations entitled to the benefits of section 251 of the Internal Revenue Code, which dividends should be entered in column 4.

Schedule F.—COMPENSATION OF OFFICERS

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Percentage of Corporation's Stock Owned: 4. Common	5. Preferred	6. Amount of Compensation
Minnie Miller—2[illegible] Ocean Dr., Miami Beach	President	Part			$ [illegible]
Total compensation of officers (Enter as item 15, page 1)					$

Note.—Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of $75,000 was paid to any officer or employee.

Schedule G.—BAD DEBTS. (See Instruction 23) (See note 1)

1. Taxable Year	2. Net Income Reported	3. Sales on Account	4. Bad Debts Charged Off by Corporation if No Reserve is Carried on Books (See note 2)	If Corporation Carries a Reserve— 5. Gross Amount Added to Reserve	6. Amount Charged Against Reserve
1936	$	$	$	$	$
1937					
1938. (See note 2)					
1939. (See note 2)					
1940. (See note 2)					

1. Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.
2. Not including securities which are capital assets ascertained to be worthless and charged off within the taxable year. Such securities charged off within the year covered by this return should be reported in Schedule C.

Schedule H.—TAXES. (See Instruction 25)

Nature	Amount	
Real estate	$ 32[illegible]	[illegible]
Personal property	14	[illegible]
Intangible personal property	[illegible]	[illegible]
Documentary stamps	37	0[illegible]
Capital stock taxes	32	[illegible]
Total (Enter as item 21, page 1) 594.[illegible]	$ [illegible] 562	[illegible]

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 26)

Name and Address of Organization	Amount
	$
Total. (Enter as item 22, page 1, subject to 5 percent limitation). (See Instruction 26)	$

Schedule J.—DEPRECIATION. (See Instruction 28)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)		4. Assets Fully Depreciated in Use at End of Year		5. Depreciation Allowed (or allowable) in Prior Years		6. Remaining Cost or Other Basis to be Recovered		7. Estimated Life Used in Accumulating Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year	
Apt. Building	Aug. 6/34	$30,057	28	$ none		$ 6,292	71	$23,764	57	25 yrs	20yr	$ [illegible]	[illegible]
Furniture	various	5,452	50	5,452	50	–		–		5 yrs			
Refrigerators	12-31-37	1,670	00	none		535	70	1,134	30	10 yrs	7yrs	41	75
Total (Enter as item 24, page 1)												$ 32[illegible]	33

Schedule K.—OTHER DEDUCTIONS. (See Instruction 32)

Insurance, [illegible]; Repairs, [illegible]; Supplies, [illegible].00; Unabsorbed loan costs, $1,427.49; Total $1,591.33
This corporation declared a dividend [illegible] in complete liquidation of all of its assets to its stockholder on February 23, 19[illegible]. The property was sold on April 1, 1940, the corporation collecting the rents to the date of sale by the stockholder only

QUESTIONS

1. Date of incorporation [illegible] 21, 193[illegible]
2. State or country Florida
3. State collector's office where the corporation's return for the preceding year was filed Florida District
4. The corporation's books are in care of [illegible] Miller
   Located at 2[illegible] Ocean Drive, Miami Beach
5. Number of places of business one
6. Was the corporation during the taxable year engaged in the production of facilities for national defense through Government contracts or subcontracts? no
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? no (If so, an additional return on Form 1120 H must be filed.)
8. Is this a consolidated return of railroad corporations or Pan-American trade corporations? no (If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.)
9. If this is not a consolidated return of railroad corporations or Pan-American trade corporations, (a) did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? no; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? .... (If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired; and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)
10. Is this return made on the basis of cash receipts and disbursements? no If not, describe fully what other basis or method was used in computing net income accrual basis
11. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower no inventories If other basis is used, describe fully, state why used, and the date inventory was last reconciled with stock ....
12. Did the corporation make a return of information on Forms 1096 and 1099 for the calendar year 1940 (see Instruction 8-(1))? no
13. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") no (If answer is "yes," attach statement as required by Instruction 13-(2).)

[illegible]	[illegible]							
ASSETS								
1. Cash								
2. Notes and accounts receivable	$				$			
Less: Reserve for bad debts								
3. Inventories (Cost [illegible])	$				$			
4. Investments [illegible]:								
(a) [illegible] State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	$				$			
(b) [illegible]								
(c) Instrumentalities of the United States								
5. Other investments (Itemize)	$				$			
6. Capital assets:								
(a) Depreciable assets (Itemize)	$				$			
Total depreciable assets	$				$			
Less: Reserve for depreciation								
(b) Depletable assets	$				$			
Less: Reserve for depletion								
(c) Land								
7. Other assets (Itemize)	$				$			
8. Total Assets			$				$	
LIABILITIES								
9. Accounts payable			$				$	
10. Bonds, notes, and mortgages payable:								
(a) With original maturity of less than 1 year	$				$			
(b) With original maturity of 1 year or more								
11. Accrued expenses (Itemize)	$				$			
12. Other liabilities (Itemize)	$				$			
13. Surplus reserves (Itemize)	$				$			
14. Capital stock:								
(a) Preferred stock	$				$			
(b) Common stock								
15. Paid-in or capital surplus								
16. Earned surplus and undivided profits								
17. Total Liabilities			$				$	

Schedule M.—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS [illegible]

1. Total distributions to stockholders charged to earned surplus during the taxable year:		
(a) Cash	$	
(b) Stock of the corporation		
(c) Other property		
2. Contributions (amount over 5 percent limitation)		
3. Federal income taxes		
4. Income taxes claimed as a credit in whole or in part in Item 33, page 1		
5. Federal taxes paid on tax-free covenant bonds		
6. Excess of short-term capital losses over short-term capital gains		
7. Additions to surplus reserves (list separately):		
(a)		
(b)		
8. Other unallowable deductions:		
(a)		
(b)		
9. Adjustments not recorded on books (itemize):		
(a)		
(b)		
10. Sundry debits to earned surplus (itemize):		
(a)		
(b)		
11. Earned surplus and undivided profits at close of the taxable year (Schedule L)		
12. Total of Items 1 to 11	$	

13. Earned surplus and undivided profits at close of preceding taxable year [illegible]	$	
14. Adjusted net income [illegible]		
15. Nontaxable and partially exempt income:		
(a) Interest on:		
(1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions		
(2) Obligations of the United States issued on or before Sept. 1, 1917, Treasury notes, Treasury bills, and Treasury certificates of indebtedness		
(3) United States savings bonds and Treasury bonds owned in the principal amount of $5,000 or less		
(4) United States savings bonds and Treasury bonds owned in the principal amount of over $5,000		
(5) Obligations of instrumentalities of the United States		
(b) Other nontaxable income (itemize):		
(1)		
(2)		
16. Charges against surplus reserves (itemize):		
(a)		
(b)		
17. Adjustments not recorded on books (itemize):		
(a)		
(b)		
18. Sundry credits to earned surplus (itemize):		
(a)		
(b)		
19. Total of Items 13 to 18	$	

EXCESS PROFITS TAX (Second Revenue Act of 1940). (See Instructions for Form 1121)

(a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? ____________

(b) A corporation joining in the making of a consolidated excess profits tax return should indicate below the name and address of the corporation which filed the consolidated excess profits tax return for the entire affiliated group, and the internal revenue district in which the consolidated return is filed

(c) [illegible]

6. Capital assets:						
(a) Depreciable assets (Itemize)	$			$		
Total depreciable assets	$			$		
Less: Reserve for depreciation						
(b) Depletable assets	$			$		
Less: Reserve for depletion						
(c) Land						
7. Other assets (Itemize)	$			$		
8. Total Assets			$			$
LIABILITIES						
9. Accounts payable			$			$
10. Bonds, notes, and mortgages payable:						
(a) With original maturity of less than 1 year	$			$		
(b) With original maturity of 1 year or more						
11. Accrued expenses (Itemize)	$			$		
12. Other liabilities (Itemize)	$			$		
13. Surplus reserves (Itemize)	$			$		
14. Capital stock:						
(a) Preferred stock	$			$		
(b) Common stock						
15. Paid-in or capital surplus						
16. Earned surplus and undivided profits						
17. Total Liabilities			$			$

Schedule M.—RECONCILIATION OF NET INCOME AND ANALYSIS OF [illegible]

1. Total distributions to stockholders charged to earned surplus during the taxable year:			13. Earned surplus and undivided profits at beginning of taxable year [illegible]	$	
(a) Cash	$		14. [illegible]		
(b) Stock of the corporation			15. Nontaxable and partially exempt income:		
(c) Other property			(a) Interest on—		
2. Contributions [illegible] over 5 percent: [illegible]			(1) Obligations of a State, Territory, or political subdivision [illegible]		
3. Federal income taxes			(2) Obligations of the United States issued on or before Sept. 1, 1917, [illegible]		
4. Income taxes claimed as a credit in whole or in part in item 29, page 1			(3) United States savings bonds and Treasury bonds owned in the principal amount of $5,000 or less		
5. Federal taxes paid on taxable covenant bonds			(4) United States savings bonds and Treasury bonds owned in the principal amount of over $5,000		
6. Excess of short-term capital losses over short-term capital gains			(5) Obligations of instrumentalities of the United States		
7. Additions to surplus reserves (list separately):			(b) Other nontaxable income (Itemize):		
(a)			(1)		
(b)			(2)		
8. Other nondeductible deductions:			16. Charges against surplus reserves (Itemize):		
(a)			(a)		
(b)			(b)		
9. Adjustments not recorded on books (Itemize):			17. Adjustments not recorded on books (Itemize):		
(a)			(a)		
(b)			(b)		
10. Sundry debits to earned surplus (itemize):			18. Sundry credits to earned surplus (Itemize):		
(a)			(a)		
(b)			(b)		
11. Earned surplus and undivided profits at close of the taxable year (Schedule L)					
12. Total of lines 1 to 11	$		19. Total of lines 13 to 18	$	

EXCESS PROFITS TAX (Second Revenue Act of 1940). (See Instructions for Form 1120)

(a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? ____________

(b) A corporation joining in the making of a consolidated excess profits tax return should indicate below the name and address of the corporation which filed the consolidated excess profits tax return for the entire affiliated group, and the internal revenue district in which the consolidated return is filed

(c) If a personal service corporation signifies below its desire not to be subject to the excess profits tax, it shall be exempt from such tax and the provisions of Supplement S, Chapter 1, shall apply to the shareholders in such corporation who were such shareholders on the last day of the taxable year of the corporation. (Attach Form 1121PS.) ____________

(d) If corporation claims exemption under section 727 of the Internal Revenue Code, state basis of claim ____________

(e) If an excess profits tax return is not being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is not greater than $5,000, the following Schedule E should be filled in. The completion of Schedule E does not constitute the filing of an excess profits tax return.

Schedule E.—EXCESS PROFITS NET INCOME COMPUTATION

1. Normal-tax net income (item 30, page 1)	$		5. Dividends received credit adjustment (item 32, page 1, excluding dividends received from foreign personal holding companies, unless [illegible])		
2. 50 percent of interest on borrowed capital			6. Income and income defense taxes (item 28, page 2)		
3. Net long-term capital loss (item 11 (b), page 2)			7. Net long-term capital gain (item 11 (b), page 2)		
4. Total of lines 1 to 3	$		8. Net gain from sale or exchange of depreciable property held more than 18 months		
			9. Income from retirement of bonds, etc.		
			10. Refunds and interest on Agricultural Adjustment Act taxes		
			11. Recoveries of bad debts		
			12. Total of lines 5 to 11	$	

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13. Excess profits net income (for purpose of determining necessity for filing return) (line 4 minus line 12) $

The schedules on this page must be completed by every corporation except those filing within the nine classes enumerated in instruction 10, even though the corporation elects, under section 1311 (a) of the Code, to make a new declared value. (See instructions 5 to 9, inclusive, 14 and 15.)

SCHEDULE I. STATUTORY ADJUSTMENTS FOR TRANSACTIONS DURING INCOME-TAX YEAR ENDED

DECEMBER 31, 1939, OR INCOME-TAX FISCAL YEAR ENDED December 31, 19 39

Value established for the taxable year ended June 30, 1939 (see instruction 7)		$ 2,[illegible]
Additions:		
A. (1) Total cash paid in for stock or shares (see instruction 7, item A)	$ —	
(2) Fair market value of all property paid in for stock or shares (see instruction 7, item A)	—	
B. Paid-in surplus and contributions to capital (see instruction 7, item B)	—	
C. Net income (if net loss, enter as item 2) (see instruction 7, item C)	—	
D. Income wholly exempt from Federal income tax (see instruction 7, item D)	—	
E. Excess, if any, of deduction for depletion over the amount which would be allowable if computed without regard to discovery value or to percentage depletion under section 114 (b) (3), (4), or (5) of the applicable income-tax law (see instruction 7, item E)	—	
Total additions	—	
Total excess amounts		$ 20,900.00
Deductions:		
1. (a) Total cash distributed to shareholders (see instruction 7, item 1)	$ —	
(b) Fair market value of all property distributed to shareholders (see instruction 7, item 1)	—	
2. Amount disallowed as deduction by section 24 (a) (5) of the applicable income-tax law (see instruction 7, item 2) (attach itemized statement)	—	
3. Excess of deductions allowable over gross income and claimed on income-tax return (see instruction 7, item 3)	95.55	
Total deductions		95.55
Adjusted value (enter in Part A of block 10, page 1)		$ 2,[illegible]

SCHEDULE II. ANALYSIS OF CHANGES IN CAPITAL STOCK AND SURPLUS

(See instruction 6, page 10)

Capital stock and Surplus at beginning of year*		**Deductions—Capital transactions**	
1. Capital stock: Preferred	$	12. Distributions to shareholders (items 1 (a) and (b), Schedule I**)	
Common	3,092.22	(a) Earnings or profits	$
2. Capital or paid-in surplus		(b) Liquidating	
3. Surplus reserves		(c) Other	
4. Surplus and undivided profits	4th. 62	13. Enter class and amount of distributions in corporation's own stock:	
Additions—Capital transactions		$	
5. Total cash and fair market value of property paid in for stock or shares (total of items A(1) and A(2) Schedule I)**		14. Other deductions (to be detailed)	
6. Paid-in surplus and contributions to capital (item B, Schedule I)**			
7. Other additions (to be detailed)			
		Deductions—Income transactions	
		15. Excess of deductions allowable over gross income and claimed on income-tax return (item 3, Schedule I)	95.55
		16. Deductions disallowed by sec. 24 (a) (5) of income-tax law (item 2, Schedule I)	
Additions—Income transactions		17. Other deductions (to be detailed)	
8. Net income (item C, Schedule I)			
9. Income wholly exempt from income tax (item D, Schedule I)			
10. Excess of deduction for depletion (same as item E, Schedule I)		**Capital Stock and Surplus at end of year**	
11. Other additions (to be detailed)		18. Capital stock: Preferred	
		Common	3,092.22
		19. Capital or paid-in surplus	
		20. Surplus reserves	
Total	$ 2,807.95	21. Surplus and undivided profits	4th. 51
		Total	$ 2,807.95

* The amount entered in items 1, 2, 3, and 4 under this heading should correspond to that entered in items 18, 19, 20, and 21 of Schedule II of the return filed for the previous year.

** Enter values shown by the books and if different from values entered in Schedule I, explain difference.

FORM 1040

UNITED STATES INDIVIDUAL INCOME AND DEFENSE TAX RETURN 1940

FOR GROSS INCOMES OF MORE THAN $5,000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1940

or fiscal year beginning ....., 1940, and ended ....., 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

(Collector's Stamp)

THE TAX COURT OF THE U.S.
DIV. 4
JAN 21 1943
PETITIONER'S EXHIBIT
RESPONDENT'S

11075

19 (Do not use these spaces)
507
200480

PAID
1-6
MAR 23 1943

FIRST NAME AND ADDRESS PLAINLY. (See Instructions C)

(Name) (Give names of both husband and wife, if this is a joint return)

1144 Ocean Drive
(Street and number, or rural route)

Miami Beach (Post office) Dade (County) Florida (State)

First Payment $

Item and Instruction No.	INCOME		
1.	Salaries and other compensation for personal services. (From Schedule A)	$ 3,777	33
2.	Dividends		
3.	Interest on bank deposits, notes, mortgages, etc.		
4.	Interest on corporation bonds		
5.	Taxable interest on Government obligations, etc. (From Schedule B)		
6.	Income (or loss) from partnerships, syndicates, pools, etc. (other than capital ... assets). (Furnish names and addresses):		
7.	Income from fiduciaries. (Furnish names and addresses):		
8.	Rents and royalties. (From Schedule C)		
9.	Income (or loss) from business or profession. (From Schedule D)		
10.	(a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)		
	(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)		
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)		
11.	Other income (including income from annuities). (State nature)		
12.	Total income in items 1 to 11. (Enter nontaxable income in Schedule T)		$ 3,777 33
	DEDUCTIONS		
13.	Contributions paid. (Explain in Schedule H)	$	
14.	Interest. (Explain in Schedule H)		
15.	Taxes. (Explain in Schedule H)		
16.	Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)		
17.	Bad debts. (Explain in Schedule H)		
18.	Other deductions authorized by law. (Explain in Schedule H)		
19.	Total deductions in items 13 to 18		
20.	Net income (item 12 minus item 19)		$ 3,777 33

COMPUTATION OF TAX

PETITIONER'S EXHIBIT 9
RESPONDENT'S

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

IRVIN MILLER
(Name) (Give given names of both husband and wife, if this is a joint return)

1144 Ocean Drive
(Street and number, or rural route)

Miami Beach Dade Florida
(Post office) (County) (State)

PAID
1-6
MAR 29 1948
Cash—Check or M. O.
First Payment
$

Item and Instruction No.

INCOME

1.	Salaries and other compensation for personal services. (From Schedule A)	$ 7,777 33
2.	Dividends	
3.	Interest on bank deposits, notes, mortgages, etc.	
4.	Interest on corporation bonds	
5.	Taxable interest on Government obligations, etc. (From Schedule B)	
6.	Income (or loss) from partnerships, syndicates, pools, etc. (other than capital ... assets). (Furnish names and addresses):	
7.	Income from fiduciaries. (Furnish names and addresses):	
8.	Rents and royalties. (From Schedule C)	
9.	Income (or loss) from business or profession. (From Schedule D)	
10.	(a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)	
	(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)	
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)	
11.	Other income (including income from annuities). (State nature)	
12.	Total income in items 1 to 11. (Enter nontaxable income in Schedule I)	$ 7,777 33

DEDUCTIONS

13.	Contributions paid. (Explain in Schedule H)	$
14.	Interest. (Explain in Schedule H)	
15.	Taxes. (Explain in Schedule H)	
16.	Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)	
17.	Bad debts. (Explain in Schedule H)	
18.	Other deductions authorized by law. (Explain in Schedule H)	
19.	Total deductions in items 13 to 18	
20.	Net income (item 12 minus item 19)	$ 7,777 33

COMPUTATION OF TAX

21.	Net income (item 20 above)	$	28. Normal tax (4% of item 27)	$ 311 07
22.	Less: Personal exemption. (From Schedule J-1)	$	29. Surtax on item 24. (See Instruction 29)	211 73
23.	Credit for dependents. (From Schedule J-2)		30. Total (item 28 plus item 29)	$ 522 80
24.		$	31. Total income tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)	$ 522 80
25.	L...		32. Less: Income tax ... foreign country or U. S. possession (Attach Form 1116)	$
26.	Earned income (From Schedule K-1 or K-2)		33.	
			34. Balance of income tax (item 31 minus items 32 and 33)	$
			35. Defense tax (10% of item 31). (See Instruction 35)	
27.	Balance subject to normal tax		36. Total income and defense taxes due (item 34 plus item 35)	$

NOTE.—In order that this ... may be considered as made ... requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and ACCURATELY.

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Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, COMMISSIONS, BONUSES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. [illegible]	2. Amount		3. Expenses (itemize)	4. Amount	
Astor Holding Co.	$ 833	33		$	
Court Holding Co.	500	00			
Total of column 2 minus total of column 4 (enter as item 1, page 1)				$ 1,333	33

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction C)

1. Obligations [illegible]	2. [illegible]		3. Interest received or accrued during the year		4. Amount of principal [illegible]	5. Interest on amount in excess of exemption	
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	$		$		All	xxxxxxxx	xx
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended					All	xxxxxxxx	xx
(c) Obligations of United States issued on or before September 1, 1917					All	xxxxxxxx	xx
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness					All	xxxxxxxx	xx
(e) United States Savings Bonds and Treasury Bonds					$5,000	$	
(f) Obligations of instrumentalities of the United States (other than obligations [illegible] in (b) above)					None		
(g) Total (enter as item 2, page 1)						$	

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

1. Kind of property	2. Amount		3. Depreciation (explain in Schedule E)		4. Repairs (explain below)		5. Other expenses (itemize below)		6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 8, page 1)	
	$		$		$		$		$	

Explanation of deductions claimed in columns 4 and 5 ....

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

(State (1) nature of business ....; (2) number of places of business ....; (3) business name and address if different from name and address on page 1 ....)

1. Total receipts .... $

COST OF GOODS SOLD (To be used where inventories are an income-determining factor)		
2. Inventory at beginning of year	$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (itemize below)		
7. Total of lines 2 to 6	$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 minus line 8)	$	
10. Gross profit (line 1 minus line 9)	$	

OTHER BUSINESS DEDUCTIONS		
11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	$	
12. Interest on business indebtedness		
13. Taxes on business and business property		
14. Losses (explain below)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence, and depletion (explain in Schedule E)		
17. Rent, repairs, and other expenses (itemize below or on separate sheet)		
18. Total of lines 11 to 17	$	
19. Net profit (or loss) (line 1 minus lines 9 and 18) (enter as item 9, page 1)	$	

If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M." on lines 2 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed in lines 6, 14, and 17 ....

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property	2. [illegible]	3. Cost or other basis (Do not include land ...)	4. Assets fully depreciated ...	5. Depreciation al...	6. Remaining cost or other basis to be ...	7. [illegible]	8. Estimated remaining life from ...	9. Depreciation allowable this ...

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Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

1. Kind of property (If necessary, attach separate statement of descriptions. Describe real estate fully.)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements made subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (applies on Schedule E)	8. Gain or loss (subtract 6 plus subtract 7 from the sum of columns 5 and 6)	Gain or loss to be taken into account: 9. Per cent	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			$	$	$	$	$	100	$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter as line 1, column 3, of summary below)									$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS									
			$	$	$	$	$	66⅔	$
								66⅔	
								66⅔	
								66⅔	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
Stock-Swart Holding Co.	2-6-34	P-27-40	11,[illegible]	[illegible]			11,[illegible] 68	50	7,26[illegible] 84
*Represents the fair market value of the assets distributed to its stockholder by a dividend in kind on December 22, 1940								50	
								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									$

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnerships and common trust funds*		5. Total net gain or loss to be taken into account on columns 2, 3, and 4 of this summary	
		Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 5)	$	$	$	$	$	$	No net loss allowable (see Instruction 10)
2. Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 5)		$	$	$	$	$	$

COMPUTATION OF ALTERNATIVE TAX

Use only (1) If you had a net long-term *capital gain*, and item 24, page 1, exceeds $22,000
(2) If you had a net long-term *capital loss*, and such loss plus item 24, page 1, exceeds $22,000

1. Net income (item 20, page 1). (See Instruction 10)	$	10. Normal tax (4% of line 9)	$
2. (a) Net long-term capital gain (item 10 (b), page 1)		11. Surtax on line 6. (See Instruction 29)	
(b) Net long-term capital loss (item 10 (b), page 1)		12. Partial tax (line 10 plus line 11)	$
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10)	$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
4. Less: Personal exemption. (From Schedule J-1)	$	(b) 30% of net long-term capital loss (30% of line 2 (b))	
5. Credit for dependents. (From Schedule J-2)		14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	$
6. Balance (surtax net income)	$	15. Total normal tax and surtax (item 30, page 1)	$
7. Less: Interest on Government obligations, etc. (See Instruction 25)	$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	$
8. Earned income credit. (From Schedule K-1 or K-2). (See Inst. 16)			
9. Balance subject to normal tax	$		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS
(See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)

1. Kind of property (if necessary attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Percentage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			$	$	$	$	$	100	$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS									
			$	$	$	$	$	66⅔	$
								66⅔	
								66⅔	
								66⅔	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
Stock-Court			$	$	$	$	$	50	
Holding Co.	8-6-34	2-27-40	17,7[illegible] 20	* 2,[illegible] 23			14,526 6[illegible]	50	7,263 5[illegible]
*Represents the fair market value of its assets distributed to								50	
its stockholder by a dividend in kind on February 2[illegible], 1940								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									$

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year)	3. Net gain or loss to be taken into account from column 10, above: Gain	3. Loss	4. Net gain or loss to be taken into account from partnerships and common trust funds: Gain	4. Loss	5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary: Gain	5. Loss
1. Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 5)	$	$	$	$	$	$	No net loss allowable (see Instruction 10)
2. Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 5)		$	$	$	$	$	$

COMPUTATION OF ALTERNATIVE TAX

Use only (1) If you had a net long-term *capital gain*, and item 24, page 1, exceeds $22,000
(2) If you had a net long-term *capital loss*, and such loss plus item 24, page 1, exceeds $22,000

1. Net income (item 20, page 1). (See Instruction 10)		$	10. Normal tax (4% of line 9)	$
2. (a) Net long-term capital gain (item 10 (b), page 1)			11. Surtax on line 6. (See Instruction 27)	
(b) Net long-term capital loss (item 10 (b), page 1)			12. Partial tax (line 10 plus line 11)	$
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10)		$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
4. Less: Personal exemption. (From Schedule J-1)	$		(b) 30% of net long-term capital loss (30% of line 2 (b))	
5. Credit for dependents. (From Schedule J-2)			14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	$
6. Balance (surtax net income)		$	15. Total normal tax and surtax (item 30, page 1)	$
7. Less: Interest on Government obligations, etc. (See Instruction 25)	$		16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	$
8. Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)				
9. Balance subject to normal tax		$		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS

(See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss) (enter as item 10 (c), page 1)						$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page: ....

If any of such items were acquired by you other than by purchase, explain fully how acquired: ....

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Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
		$			$

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction C)

1. Source of income	2. Nature of income	3. Amount
		$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 19 AND 20. (See Instructions 19 and 20)

(a) Personal Exemptions

Class	Number of persons listed in this part for each class	Credit claimed
Single, or married and not living with husband or wife		$
Married and living with husband or wife	1	
Head of family (explain below)		

(b) Credit for Dependents

Name of dependent and relationship	Number of months during the year: Under 19 years old	Number of months during the year: Over 18 years old	Credit claimed
			$

Reason for support if over 18 years old _____

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 20)

(a) If your net income is $5,000 or less, complete this part of schedule.

Net income (item 20, page 1)	$	
Earned income credit (10% of net income, above)		

(b) If your net income is more than $5,000, complete only this part of schedule.

Earned net income (not more than $14,000)	$ 3,333	33
Net income (item 20, page 1)	3,333	33
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than $30)	300	00

QUESTIONS

1. State your principal occupation or profession corp. officer
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. Did you file a return for any prior year? Yes If so, what was the latest year? 1939 To which Collector's office was it sent? Florida District
4. Are items of income or deductions of both husband and wife included in this return? No
5. State (a) Name of husband or wife if separate return was made _____ (b) Personal exemption, if any, claimed thereon $2000.00 (c) Collector's office to which it was sent Florida
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") No (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I (we) swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me (us), and to the best of my (our) knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Marion Miller
(Signature) (See Instruction D)

Subscribed and sworn to by _____ before me this 2nd day of March, 1941

_____
(Signature)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper

		$					$	

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income	2. Nature of income	3. Amount
		$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption

Status	Number of months during the year in such status	Credit claimed
Single, or married and not living with husband or wife		$
Married and living with husband or wife	12	
Head of family (explain below)		

(2) Credit for Dependents

Name of dependent and relationship	Number of months during the year: Under 18 years old	Number of months during the year: Over 18 years old	Credit claimed
			$

Reason for support if over 18 years old ....

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 20)

(1) If your net income is $3,000 or less, compute this part of schedule

Net income (item 20, page 1)	$	
Earned income credit (10% of net income, above)		

(2) If your net income is more than $3,000, use only this part of schedule

Earned net income (not more than $14,000)	$ 3,333	33
Net income (item 20, page 1)	8,093	67
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than $300)	300	00

QUESTIONS

1. State your principal occupation or profession corp. officer
2. Check whether you are a citizen [X] or a resident alien [ ].
3. Did you file a return for the prior year? yes If so, what was the latest year? 1940 To which Collector's office was it sent? Florida, Miami lst
4. Are items of income or deductions of both husband and wife included in this return? No
5. State: (a) Name of husband or wife if separate return was made Leslie Miller
(b) Personal exemption, if any, claimed thereon $2900.00
(c) Collector's office to which it was sent Florida
6. Check whether this return was prepared on the cash [X] or accrual [ ] basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") no (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Minnie Miller
(Signature) (See Instruction E)

Subscribed and sworn to by Minnie Miller
before me this 26 day of March, 1941
[illegible signature]
[illegible]
A return made by an agent must be accompanied by power of attorney. (See Instruction E)

....
(Signature)
(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouse preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 26th day of March 1941
[illegible signature]
[illegible]

[illegible signature]
(Signature of person preparing the return)
....
(Signature of person preparing the return)
[illegible]
(Name of firm or employer, if any)

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RESPONDENT'S EXHIBIT E.

The Tax Court of the U. U., Div. 4, Document 111075.
Admitted in Evidence Jan. 21, 1943.

Record of certain disbursements from the account of Aaron Feiwish at the Mercantile National Bank of Miami Beach, Fla.:

Date	Amount	Payable to
12/16/38	$ 500.00	Louis Miller.
12/24/38	500.00	Louis Miller.
1/18/39	1,500.00	Louis Miller.
2/ 1/39	1,000.00	Louis Miller.
2/10/39	1,000.00	Louis Miller.
2/24/39	1,500.00	Louis Miller.
2/28/39	500.00	Court Holding Co.
4/27/39	500.00	Cash.
6/13/39	500.00	L. & H. Miller.
9/27/39	125.00	J. Miller.
10/10/39	100.00	Joseph Miller.
11/ 1/39	150.00	Joseph Miller.
12/ 8/39	1,350.00	Louis Miller.
12/19/39	1,000.00	Louis Miller.
12/28/39	1,000.00	Louis Miller.
1/ 5/40	1,000.00	Louis Miller.
2/15/40	1,050.00	A. C. Fine.
2/27/40	500.00	Louis Miller.
3/ 2/40	1,000.00	Louis Miller.
4/ 2/40	1,475.00	Louis Miller & Minnie Miller.

74 RESPONDENT'S EXHIBIT F.

The Tax Court of the U. S., Div. 4, Docket 111075.
Admitted in Evidence Jan. 21, 1943.

State of Florida,
County of Dade. ss.

Personally appeared before me, the undersigned authority, Mrs. Minnie Miller, who, being duly sworn according to law, deposes and says:

I am the wife of Louis Miller and the mother of Harry Miller. I reside at the Victor Hotel, 1144 Ocean Drive, Miami Beach, Florida.

The Mayfield Court Apartments, located at 730 Pennsylvania Avenue, Miami Beach, Florida, were built by my husband, Louis Miller, beginning in 1926 and completing it in 1927. A man whose name I do not remember had agreed to invest $30,000.00 in this building, and after it was completed he was unable to raise the money and failed to make the investment as part owner with my husband.

There was a first mortgage bond issue on the building of about $65,000.00, and when it appeared that the building would be lost through foreclosure proceedings I asked my husband to give it to me to try to salvage what I could out of it. Thereafter, I borrowed money from various sources, bought up the outstanding bonds and foreclosed the building. I do not know in what manner the buying of the bonds and the foreclosure was handled, whether it was in the name of a corporation of which I owned the stock or whether it was in the name of a corporation the stock of which was held in the name of my son, M. Victor Miller. However, at all times, regard-

less of the manner in which the title to the building was held after I took it over from my husband when it was about to be foreclosed, it has been considered my property.

At the time my son's estate was investigated for estate tax purposes, the question arose as to whether or not the stock of the company owning this property was the stock of his estate or mine, and it was decided that the stock belonged to me and it was not included in the estate tax return of my son.

In October 1938, the apartment building was leased to Mr. and Mrs. Aaron Feiwish and they paid rent on the building for one year only. After Mr. and Mrs. Feiwish had operated the apartment for the one year for which they paid rent, they entered into negotiations with me for the purchase of the apartment building and the sale was finally agreed upon before the second year's rent came due under the lease. All payments made by Mr. and Mrs. Feiwish or by Mrs. Feiwish's brother-in-law and sister, Mr. and Mrs. A. C. Fien, subsequent to the first year's rent of $8,500.00, was on the purchase price of the building and was not rent. I do not remember the exact dates, but these are the facts with reference to the rental of the building and its subsequent sale to Mr. and Mrs. Feiwish. It is my understanding that Mr. and Mrs. Feiwish did not have sufficient money to buy the building and that Mrs. Feiwish's sister and brother-in-law advanced certain money to her for the purpose of assisting her in paying the purchase price.

MINNIE MILLER.

Subscribed and sworn to before me this 3d day of December, 1941.

J. J. BROWN,
(J. J. Brown),
Special Agent, Internal
Revenue Service.

76 2 T. C. No. 65.

The Tax Court of the United States.

Court Holding Company, a Florida Corporation,
vs. Docket No. 111075.
Commissioner of Internal Revenue, Respondent.

Promulgated August 9, 1943.

The petitioner is a corporation with two stockholders, husband and wife. The husband, who largely looked after the business, acting for the corporation, orally agreed to sell the corporate property, upon specified terms, and $1,000 was received on the purchase price. At a meeting between the parties for execution of formal contract of sale, the stockholders were informed that a sale by the corporation would cause imposition of heavy income taxes. They refused to sell, but immediately caused the corporation to distribute the property in kind to them as a liquidation dividend, and they then passed title to the purchaser for the same purchase price. *Held,* that the sale was made by the corporation. *Held, further,* that though denominated rent discount on the corporate books, an item of $350 was paid as compensation for use of money borrowed, and is deductible as interest paid. Fraud penalties disapproved.

Maurice Kay, Esq., for the petitioner.

F. L. Van Haaften, Esq., for the respondent.

The Commissioner determined the following deficiencies and penalties in income tax and excess profits tax:

Year	Tax	Deficiency	Delinquency Penalties	Fraud Penalties
1938	Income	$ 200.70	None	None
1939	Income	254.97	$ 12.75	None
1940	Income	3,146.20	786.55	$1,573.10
	Excess profits...	2,509.18	627.30	1,254.59

The petitioner has waived the only issue affecting the year 1938 and certain of the issues affecting the years 1939 and 1940. The following questions remain:

1. Whether the petitioner is entitled to a deduction for 1939 in the amount of $350 alleged to have been paid as a bonus for a cash loan made to the petitioner.

2. Whether the petitioner is taxable with the profit realized on the sale of all of its assets in 1940, or whether the sale was made by its stockholders individually after distribution of the assets to them in complete liquidation.

3. Whether the petitioner is liable for the proposed delinquency and fraud penalties for 1940.

FINDINGS OF FACT.

The petitioner was incorporated under the laws of the State of Florida in May, 1934. Its income and excess profits tax returns for the years here involved were filed with the collector for the district of Florida.

The petitioner was formed for the purpose of acquiring title, at a mortgage foreclosure sale, to a parcel of improved real property known as the Mayfield Court apartments, in Miami Beach, Florida. The land and building and its furnishings were the only assets ever owned by the petitioner. Outstanding stock consisted of 50 shares of which, during the taxable years, Minnie Miller owned 48 and her husband, Louis Miller, owned 2.

In 1938 the petitioner executed a lease of the building and the furnishings to Aaron and Regina Feiwish for a term of three years commencing October 1, 1938, at the agreed rental of $3,500 a year payable in installments on the following dates in each year of the term:

$2,000 on or before October 1,
1,000 on December 15,
1,500 on January 15,
2,000 on February 1,
2,000 on February 20.

The lessees agreed also to pay and did pay an initial deposit of $2,000 to be held as a guarantee for the proper surrender of the premises upon expiration of the lease and as security for the payment of rent.

The rent for the first year of the term was paid. In June, 1939, Louis Miller executed and delivered to Regina Feiwish three promissory notes, payable one year from date, as evidence of a cash loan made by her to the petitioner. The loan was in the amount of $3,500, and the three notes were in the respective amounts of $500, $1,000, and $2,000. Upon receipt of the proceeds of the loan the petitioner paid a cash bonus of $350 to Regina Feiwish in consideration of her making the loan. Pursuant to authority from Louis Miller, the $2,000 note was applied in payment of rent due under the Feiwish lease in October, 1939. The $500 note and the $1,000 note were similarly applied in December, 1939, and January, 1940, respectively. The $350 cash bonus was subsequently entered upon the petitioner's books as rent discount, and deduction was claimed therefor on its 1939 return.

At some time subsequent to October 1, 1939, Aaron and Regina Feiwish began negotiations with Minnie Miller for the purchase of the petitioner's building

Regina Feiwish interested her sister Margaret W. Fine, and the latter's husband Abe C. Fine, in the proposed purchase. In February, 1940, Louis Miller, acting for the petitioner, agreed to sell and the Fines agreed to purchase the property for $54,500. The terms and conditions of sale were settled between them, and on February 22, 1940, the interested parties met in the office of an attorney, engaged by the Fines, for the purpose of having the oral agreement reduced to writing and executed. The petitioner was represented at the meeting by Louis Miller and Harry A. Miller, its president and secretary.

The attorney prepared a contract embodying the terms of the prior verbal agreement, but the writing was never executed. Either at the meeting of February 22, or on February 23 or 24, the petitioner's attorney advised the purchaser that the petitioner could not consummate the sale, giving as his reason that it would result in the imposition of a large income tax, since the property had been purchased for a low price at a judicial sale.

On the afternoon of February 23, 1940, the petitioner's attorney met with Minnie, Louis and Harry A. Miller, and the petitioner's accountant. The three Millers, being all of the directors of the petitioner then held a meeting at which Louis Miller proposed that "it would be in the best interest of the corporation to have it declare a dividend payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." A resolution embodying the proposal was adopted. Immediately thereafter, Louis and Minnie Miller as stockholders adopted a resolution ratifying and confirming the action of the directors. On the same afternoon, subsequent to the adoption of the resolutions, a deed conveying the property in question to Louis Miller and Minnie Miller was signed on petitioner's behalf by Louis Miller, as president, and attested by Harry A. Miller, as secretary. The conveyance was expressly made subject to building

restrictions and public easements, and certain property taxes and existing mortgages, but otherwise purported to transfer an unqualified estate in fee simply to the grantees. Thereafter, the attorney for the purchaser was notified of the change in title and was requested to prepare a new contract naming the Millers, individually, as vendors. The contract was drawn providing for the same purchase price and embodying the same terms and conditions as had been agreed upon at the meeting of February 22, except for a correction in the amount stated to be unpaid balance of an existing mortgage to which the sale was subject. It was executed by the Millers and by Margaret W. Fine on February 26, 1940. The deed from the petitioner to the Millers was recorded in the county records office on the same day.

Subsequent to October 1, 1939, Aaron Feiwish drew bank checks payable to the Millers as follows:

1939		1940	
October 10,	$ 100	January 5,	$1,000
November 1,	150	February 27,	500
December 8,	1,350	March 2,	1,000
December 19,	1,000	April 2,	1,475
December 28,	1,000		
		Total	3,975
Total	$3,600		

The check of January 5, 1940 in the amount of $1,000 was applied in payment of part of the purchase price of the apartment property, and not as rent. The contract of February 26, provided for payment of the balance of the purchase price, amounting to $53,500, as follows: $12,500 in cash upon the transfer of title, $36,000 by the purchaser's assumption of two existing mortgages aggregating that amount, and $5,000 by the execution of a promissory note secured by a third mortgage to the

vendors. After February 26, the purchaser made payments totaling $2,525 on account of the cash payment due upon delivery of deed. Title was transferred on April 1, 1940, at which time the balance of cash due in the amount of $9,975 was paid. The $2,000 security deposit paid by the Feiwishes under their lease was applied in curtailment of the purchase money note and third mortgage.

The petitioner has transacted no business and has owned no property since the distribution of its assets to the Millers, but has not been formally dissolved. During the period from 1938 to 1940, an accountant engaged by the petitioner had, on different occasions, recommended that petitioner dissolve and distribute its assets to the stockholders. The Millers had refrained from following the recommendation for the reason that Louis Miller was personally liable for a large indebtedness of a construction business in which he was interested, and he was unwilling to subject the apartment property to his personal obligations. By February, 1940, the debts of the construction business had been paid.

The 1940 return filed for the petitioner reported no taxable gain as having been realized from the sale of its assets. The following statement was typewritten under Schedule K of the return: "This corporation declared a dividend in kind in complete liquidation of all of its assets to its stockholder on February 23, 1940. The property was sold on April 1, 1940, the corporation collecting the rents to the date of sale by the stockholder only." Minnie Miller's 1940 return reported a long-term capital gain of $14,526.68 on the exchange of her stock in the petitioner of which amount $7,263.34 was taken into account in computing net income. The following statement in explanation of the amount realized upon disposition of the stock appears: "Represents the fair market value of its [petitioner's] assets distributed to its stockholder by a dividend in kind of February 23, 1940."

At the time of filing of the returns for the taxable years no books or accurate records of the petitioner's affairs had been kept. Checks for rent under the Feiwish lease had frequently been made payable to the Millers individually, and at times had been deposited in accounts of other corporations in which the Millers were interested. The accountant who prepared the returns did so from notes and memoranda furnished by petitioner's officers, and from such other information as he could gather. Net losses were reported in the following amounts:

1938	$ 177.88
1939	95.55
1940	1,491.94

In the fall of 1941, after the returns were under examination by agents of the Bureau of Internal Revenue, the accountant prepared books and made entries for the three years from such records as were then available. Entries then made reflected net profit (or loss) as follows:

1938	$ 877.78 (profit)
1939	1,178.25 (profit)
1940	450.50 (loss)

The returns cannot be reconciled with the books. No amended returns were filed. The return for 1940 reported income from rent in the amount of $2,125. The books reflect income from rent in the amount of $1,000. The 1939 return was filed March 18, 1940. The 1940 return was filed March 28, 1941, the Collector of Internal Revenue having granted an extension of time for filing until March 30, 1941. Through inadvertence the 1940 return was not verified by the officers who executed it.

The respondent adjusted reported net income so as to reflect the profit or loss shown by the books, and dis-

allowed a portion of the amounts deducted for depreciation in each year. He determined that the $350 deducted as rent discount on the 1939 return is not allowable, and that the petitioner realized profit on the sale of its property in the amount of $23,982.07, taxable to it in 1940. The $1,000 shown on the books as income from rent in 1940 was determined to have been a payment on the purchase price and is reflected in the figure representing the profit on the sale.

The petition does not assign error with respect to the adjustments made to reflect profit or loss shown by the books; the issue arising out of the disallowance of portions of the depreciation deductions has been waived; the correctness of the other adjustments made by the respondent, and petitioner's liability for the delinquency and fraud penalties proposed for 1940 remain at issue.

OPINION.

DISNEY, Judge:

We consider first the question whether the petitioner is entitled to a deduction from gross income for 1939 for the $350 paid to Regina Feiwish and designated by the petitioner as rent discount. The grounds upon which the deduction was disallowed are not stated in the deficiency notice, and the respondent's brief contains no argument on this issue. In our opinion the amount in question constituted interest paid on an indebtedness of the petitioner, and is deductible. It is true that the promissory notes representing the Feiwish loan were made by Louis Miller, individually, but it is not disputed that the loan was made to the petitioner or that it was repaid by the petitioner. That payment of the indebtedness of another was made by the petitioner as a volunteer cannot be assumed. The evidence shows also that $350 was paid as compensation for the use of borrowed money, although denominated as rent discount. It falls

within the ordinary and accepted definition of "interest", and it is in the ordinary and accepted sense that that term is used in the revenue acts. *Old Colony Railroad Co. v. Commissioner,* 284 U. S. 552. That the amount was prepaid and that it was paid in a lump sum rather than computed at a particular rate are facts which do not necessarily alter its character as interest. *John D. Fackler,* 39 B. T. A. 395; *Kena, Inc.,* 44 B. T. A. 217. The petitioner's accountant testified that its returns were made on an accrual basis of accounting. If that were so, it may be that the sum in question, constituting a bonus charged for making the loan, would have to be amortized over the life of the loan, and would not be deductible in full in 1939 since the notes did not mature until after the close of the year. See *Julia Stow Lovejoy,* 18 B. T. A. 1179, and *S. & L. Building Corporation,* 19 B. T. A. 788, 794. However, that question need not be decided. The petitioner had no books of account and maintained no records of any substantial nature until after the close of the taxable years, when books were prepared from such information as was then available. Under such circumstances we hold it was not on an accrual basis. *John A. Barnder,* 3 B. T. A. 231; *Mansuss Realty Co., Inc.,* 1 T. C. 932. The testimony of the accountant to the contrary can not be followed. The situation here then is entirely parallel with that involved in *John D. Fackler, supra,* which held that a taxpayer on the cash basis is entitled to deduct prepaid interest in the year of payment. On this issue we hold for the petitioner.

The respondent has determined that the petitioner is taxable with the profit realized on the sale of the Mayfield Court Apartments to Margaret W. Fine. The petitioner contends that the sale was made by its stockholders individually after the property had been distributed to them in complete liquidation, and that therefore the petitioner realized no taxable gain on the sale.

In our opinion, the respondent must be sustained. When Louis Miller orally agreed with the Fines upon a price and the terms of sale of the petitioner's property, the property was still owned by the petitioner. Since there is no evidence that a distribution in liquidation was contemplated at that time, and since petitioner's officers subsequently presented themselves for the purpose of executing a writing embodying the terms of the oral agreement, we think it must be said that Louis Miller was acting in the petitioner's behalf in making the agreement, and that his action was subsequently ratified by the petitioner. Cf. *Trippett v. Commissioner,* 118 Fed. (2d) 764. Moreover we think that the petitioner received payment of $1,000 on account of the agreed purchase price. A statement by Minnie Miller is to the effect that all payments made by the Fines or Feiwishes subsequent to October 1, 1939, were applied on the purchase price and not rent. It is not clear whether or not the statement purports to include amounts paid by application of the promissory notes representing the indebtedness to Regina Feiwish. But even if those amounts be eliminated from consideration, it is apparent that the statement can not be entirely accurate. The evidence establishes that between October 1 and December 31, 1939, Aaron Feiwish made payments to the Millers aggregating not less than $3,600; that an additional payment of $1,000 was made January 5, 1940; that the purchase price of the property was $54,500; that $53,500 remained unpaid on February 26, 1940; and that that amount was paid subsequent to February 26 partly in cash, partly by the assumption of existing mortgages, and partly by the execution of a new note and mortgage. Thus payments made during 1939 could not have been on account of purchase price. It is also apparent, however, that $1,000 was paid on the purchase price at some time prior to February 26, 1940, and the only payment of that amount shown to have been made subsequent to January 1 was

that of January 5. We conclude and have found as a fact that that payment was so applied. The inaccuracy of Minnie Miller's statement so far as it concerns payments made in 1939 may have resulted from confusion in her mind between the close of the first year of the term under the lease and the close of the calendar year 1939. However, we need not speculate as to the explanation. We are satisfied that the January 5, 1940, payment was applied on purchase price.

The facts then may be narrowed down to this: The petitioner having entered into an oral contract to sell its property, and having received payment of part of the agreed price, at the last moment, and admittedly for the sole purpose of avoiding taxes, distributed the property to its stockholders, who promptly thereupon bound themselves in writing to perform individually the act which they had theretofore agreed to perform as a corporation. Under such circumstances we think it must be said that the Millers were carrying out the agreement made by the corporation and not an agreement made by themselves individually. There is no evidence of any further negotiation between them and the purchaser subsequent to the meeting of February 22. On the contrary, it affirmatively appears that no intercourse took place until the contract was signed on February 26. The fair inference is that it was always intended and understood by the parties that the sale would be made exactly as agreed by the petitioner, except for the change in identity of the vendor. Acquisition of good title, regardless of vendor's identity, was obviously the only concern of the purchaser, and the transfer of title and receipt of the purchase price the prime concern of the Millers. Consummation of the oral agreement was the substantive purpose. The resolutions of February 23 and the consequent transfer of title to the Millers were unnecessary to its accomplishment, or to the acomplishment of any purpose save that of tax avoidance.

They were formal devices to which resort was had only in the attempt to make the transaction appear to be other than what it was. As such they may not be given effect. *Gregory v. Helvering*, 293 U. S. 465; *Minnesota Tea Co. v. Helvering*, 302 U. S. 609; *Griffiths v. Helvering*, 308 U. S. 355. It follows that the contract of February 26 and the transfer of April 1, 1940, were the contract and transfer of the petitioner, executed for it by its stockholders as its agents, and were not the contract and transfer of the stockholders individually. Cf. *S. A. MacQueen Co. v. Commissioner*, 67 Fed. (2d) 857; *Hellebush v. Commissioner*, 65 Fed. (2d) 902; *Trippett v. Commissioner, supra; Embry Realty Co. v. Glenn*, 116 Fed. (2d) 682; *Liberty Service Corporation*, 28 B. T. A. 1067, aff'd. 77 Fed. (2d) 94.

Under the view we have taken it is unimportant that the petitioner itself never executed a written contract to sell. Under the Florida Statute of Frauds no action could have been brought on the oral agreement, (Comp. Gen. Laws of Florida, 1927, vol. 3, § 5779), and apparently partial payment of the purchase price is not alone sufficient to avoid the effect of the statute. See *Williams v. Bailey*, 69 Fla. 225, 67 So. 877; *Maloy v. Boyett*, 53 Fla. 956, 43 So. 243; *Fireman's Fund Ins. Co. of San Francisco v. Cravey*, 101 Fla. 155, 134 So. 232. Had a writing been signed, there could be no doubt that the subsequent distribution to the Millers would be ineffective to avoid the taxing of the profit on the sale to the petitioner. *Hellebush v. Commissioner, supra; The Nace Realty Co.*, 28 B. T. A. 467, aff'd. without written opinion April 13, 1935 (C. C. A., 6th Cir.). But, as we have said, the contract which was executed and the sale which was consummated were in substance the petitioner's contract and sale. Thus any question as to the effect of the Statute of Frauds is avoided since the oral agreement was fully executed and performed. It has frequently been held that acts by the sole stockholder of

a corporation are valid and binding on the corporation, though not formally authorized. See, e. g., *Pacific State Bank v. Coats*, 205 Fed. 618; *Rent-A-Car Co. v. Globe & Rutgers Fire Insurance Co.*, 156 Atl. 847; *Bankers Trust Co. v. Economy Coal Co.*, 276 N. W. 16; *Vawter v. Rogue River Valley Canning Co.*, 262 Pac. 851. Minnie Miller was the only stockholder other than Louis Miller. We think that he made the agreement with her consent and that she ratified his acts. We have above held, as contended by the petitioner, with reference to the $350 interest item, that though the notes were made by Louis Miller individually, the loan was to the corporation. We think he was acting also for the corporation in this matter of sale. In *James Duggan*, 18 B. T. A. 608, a corporation through one of its officers entered into an oral contract to sell all its assets, including real property. Thereafter, the stockholders adopted a resolution that the assets be distributed to them in kind, appointing one of their number to receive the titles. Deeds and bills of sale were executed in favor of the appointee, the stockholders individually entering into a written contract with the purchaser for the sale of the assets. The nominee stockholder then conveyed the assets to the purchaser and received payment of the purchase price. It was held that the sale was a sale by the corporation in accordance with its prior verbal agreement, and that the profit thereon was taxable to it. The following excerpt from the opinion is apposite here:

> Inasmuch as the sales agreement was executed and the property transferred with title satisfactory to the purchaser, we are of the opinion that it must be regarded as nothing less than a contract for and on behalf of the corporation, entered into for the purposes of binding these stockholders to see that the verbal agreement, theretofore made by the corporation, to sell these properties, would be carried out. The logic

> of the events, following the conclusion of these negotiations, as well as the things undertaken to be performed in this contract, justify such conclusion, since these directors could not have legally bound the corporation in a contract for the sale of all of its capital assets without special authority from the stockholders. The stockholders, however, could be personally bound by such a contract which, when joined in by all of them, would afford the purchaser the extreme limit of protection to be legally had in the conditions. Under such circumstances a contract by all of the stockholders, they possessing among themselves the power to force its adoption by the corporation, becomes for all intents and purposes the contract of the corporation.

The *Duggan* case presented a situation closely parallel to the one we have here. In our opinion it is dispositive of the issue. See also *Liberty Service Corporation*, 28 B. T. A. 1067, aff'd. 77 Fed. (2d) 94.

The case of *Falcon Company*, 41 B. T. A. 1128, aff'd. 127 Fed. (2d) 277, relied upon by the petitioner is distinguishable. There the Falcon Company received an offer for the sale of its undivided interests in certain oil leases. As to a part of the leases, one of Falcon Company's co-owners, here called East Texas, had an option to purchase at any price offered by a third party and which Falcon Company should desire to accept. As to the other leases, East Texas had no such option. On receipt of the offer, Falcon Company notified East Texas of its right under the option to purchase within 15 days of notice. East Texas would not definitely contract to purchase and made no offer to the Falcon Company. Falcon Company, principally because of the amount of taxes involved in a sale, definitely decided not to sell the properties to anyone. Thereafter, pursuant to resolutions, the assets were distributed to petitioner's

stockholders as a partial liquidating dividend. East Texas immediately made an offer to purchase the interests of the stockholders in all the leases at the price previously bid by the third party. The offer was conditioned upon the execution of a formal contract satisfactory to all parties. Such contract was subsequently made, and the sale was consummated pursuant thereto. It was held that the sale was a sale by the stockholders, and the profit thereon taxable to them. The distinguishing feature of the case is that no contract was ever entered into prior to the distribution to the stockholders. It is true that the co-owner with the petitioner had an option to meet any price offered by an outside party, but this was contingent upon Falcon's willingness to sell for such price, which it definitely decided not to do; and East Texas had indicated that it declined to so contract, and took no action until after the assets passed out of the petitioner's hands. Moreover, the option covered only a part of the leases finally purchased by East Texas. Thus the contract entered into by the stockholders could not be held to be referable to any prior commitment by their corporation. In the instant case not only had such a commitment been made, but part of the agreed purchase price had been paid.

We think it well, also, to discuss briefly the effect here of our decision in *Clara M. Tully Trust*, 1 T. C. 611. There the respondent sought to treat a sale of stock by an outside party to the issuing corporation, as in substance a transfer by the former owners of the stock, and to tax the proceeds of the sale as a distribution in partial liquidation. The former owners, through an agent, sold their stock to a dealer in securities at a price of one hundred and one-half. The dealer on the same day resold the stock to the issuing corporation, at one hundred and one. We held that the sale to the dealer was a bona fide and unrestricted sale, the purchaser being bound by no commitment and being free to do with its purchase whatever it wished. The gain

on the sale by the stockholders was accordingly held to be taxable under the capital gains provisions. The questioned transaction was, under the facts of that case, found to be what it purported to be on its face, namely, a bona fide sale. The decision has no application in the situation presently before us, since, under the facts of this case, we have found that the distribution to stockholders was in fact subject to the petitioner's prior agreement to sell and the sale, although in form by the stockholders, was in reality in performance of the prior agreement.

We hold that the respondent properly determined that the gain on the sale of the apartment property is taxable to the petitioner. In computing the gain for entry of decision under Rule 50, none of the payments made to the Millers prior to January 1, 1940, should be considered as amounts realized as part of the purchase price.

There remain the issues arising out of the determination of the delinquency and fraud penalties for 1940, no issue having been raised with respect to the 5 per cent deliquency penalty determined for 1939. Upon brief the respondent admits that the 1940 return was filed prior to the expiration of an extension of time granted by the collector, but contends that because of its inaccuracy and since it was not sworn to it cannot be considered a return for the purpose of the imposition of the delinquency penalty of 25 per cent. *Robert A. Burns*, 47 B. T. A. 34, supports his position and we hold that the failure to make return under oath requires the addition of the 25 per cent penalty prescribed by section 291 of the Internal Revenue Code. See also *Estate of Frederick L. Flinchbaugh*, 1 T. C. 653. The respondent's answer alleges that the petitioner's failure to report as income the taxable profit on the real estate sale was fraudulent and with intent to evade tax. The petitioner filed a reply denying fraud, and averring that the loss reported on its return was correct to the best of its knowledge and belief. We think the respondent has

not sustained the burden of proving a fraudulent intent. We have concluded that the sale of the petitioner's property was in substance a sale by the petitioner, and that the liquidating dividend to stockholders had no purpose other than that of tax avoidance. But the attempt to avoid tax does not necessarily establish fraud. It is a settled principle that a taxpayer may diminish his liability by any means which the law permits. *United States v. Isham*, 17 Wall, 496; *Gregory v. Helvering, supra; Chisholm v. Commissioner*, 79 Fed. (2d) 14. If the petitioner here was of the opinion that the method by which it attempted to effect the sale in question was legally sufficient to avoid the imposition of tax upon it, its adoption of that method is not subject to censure. Petitioner took a position with respect to a question of law, the substance of which was disclosed by the statement indorsed on its return. We cannot say, under the record before us, that that position was taken fraudulently. The determination of the fraud penalties is reversed.

Decision will be entered under Rule 50.

(Seal)

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95 DECISION.

The Tax Court of the United States,
Washington.

Court Holding Company, a Florida Corporation, Petitioner,
vs. Docket No. 111075.
Commissioner of Internal Revenue, Respondent.

Pursuant to the Court's Findings of Fact and Opinion, promulgated August 9, 1943, the respondent herein having

filed a recomputation of tax on September 21, 1943, and petitioner having filed an acquiescence in said recomputation on October 9, 1943, it is

Ordered and Decided: That there are deficiencies in income tax, excess profits tax and penalties, as follows:

Year	Tax	Deficiency	Delinquency Penalties	Fraud Penalties
1938	Income	$ 200.70	$.....	.....
1939	Income	211.22	10.56	.....
1940	Income	2,353.16	588.29	None
1940	Declared value excess profits	1,815.44	453.86	None

Enter:

Entered: Oct. 12, 1943.

(Signed) R. L. DISNEY,
Judge.

(Seal)

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96 PETITION FOR REVIEW AND ASSIGNMENT OF ERROR.

Filed December 13, 1943.

(Title Omitted.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Court Holding Company, a Florida corporation, by its attorney Maurice Kay and respectfully shows:

I.

Jurisdiction.

The petitioner on review is a corporation organized and existing under the laws of Florida.

The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue.

The petitioner on review has its principal place of business at Miami, in the State of Florida. It filed its income tax return for the calendar year 1940 with the Collector of Internal Revenue for the District of Florida whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

The petitioner on review files this petition pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings.

On February 27, 1942, the Commissioner of Internal Revenue sent to the taxpayer, the petitioner on review, notice of deficiencies in income and excess profits tax for the calendar years 1938, 1939 and 1940 as follows:

Income Tax.

Year	Liability	Deficiency
1938	$ 200.70	$ 200.70
1939	254.97	254.97
1940	3,146.20	3,146.20
Total	$3,601.87	$3,601.87

Delinquency penalties for 1939 and 1940.....	799.30
50% Fraud penalty for 1940.....	1,573.10

Excess-Profits Tax.

Year	Liability	Deficiency
1938	None	None
1939	None	None
1940	$2,508.18	$2,509.18
Total.....	$2,509.18	$2,509.18

25% delinquency penalty	627.30
50% Fraud penalty	1,254.59

Thereafter, and on May 18, 1942, the taxpayer filed a petition for redetermination of said deficiencies by the Tax Court of the United States. On July 16, 1942, an amended petition was filed by the taxpayer.

The case was tried before the Tax Court of the United States on January 21, 1943, at Miami, Florida.

On August 9, 1943, the Tax Court of the United States promulgated its findings of fact and opinion (2 TC 65) and on October 12, 1943, entered its decision that there are deficiencies in income and excess profits taxes for the calendar years 1938 to 1940, inclusive, as follows:

Income Tax.

Year	Tax	Delinquency Penalty
1938	$ 200.70	.....
1939	211.22	$ 10.56
1940	2,353.16	588.29
Total.....	$2,765.08	$ 598.85

Declared Value Excess Profits Tax.

Year	Tax	Penalty
1938	None	None
1939	None	None
1940	$1,815.44	$ 453.86
Total	$1,815.44	$ 453.86

III.

Nature of Controversy.

The only question raised on this appeal relates to the calendar year 1940, and that is whether the petitioner is taxable with the profit realized on the sale of all of its assets in 1940, or whether the sale was made by its stockholders individually after distribution of the assets to them in complete liquidation.

The petitioner owned a piece of property known as the Mayfield Court Apartments. The property was the only asset of the petitioner. The property was under lease to Aaron and Regina Feiwish for a period of three years commencing October 1, 1938, for an annual rental of $8,500.00 payable in installments as follows:

$2,000.00 on or before October 1,
1,000.00 on December 15,
1,500.00 on January 15,
1,000.00 on February 1 and
2,000.00 on February 15.

The lessees agreed also to pay and did pay an initial deposit of $2,000.00 to be held as a guarantee for the proper surrender of the premises upon expiration of the lease and as security for the payment of rent.

In February, 1940, the petitioner thru its president Louis Miller was contacted by Aaron and Regina Feiwish the lessees of the premises and Abe C. Fine and Margaret W. Fine and entered into negotiations for the sale of the property to them for a consideration of $54,500. The oral understanding as to price was reduced to writing in a proposed written contract embodying terms and conditions of sale on February 22, 1940, but upon advice of counsel due to the imposition of a large income tax if the contract were consumated, the contract was not executed, and the Fine's were notified of that fact.

On the afternoon of February 23, 1940, the petitioner's attorney met with Minnie and Louis Miller, stockholders of the petitioner, and with Harry A. Miller, Secretary, and Otto F. Weber, Accountant for the petitioner. The three Miller's were all directors of the petitioner. A special directors meeting was held at which time a dividend was declared payable in the assets of the corporation in complete liquidation and surrender of all the outstanding corporate stock. Immediately, thereafter, Louis Miller and Minnie Miller as stockholders adopted a resolution ratifying and confirming the action of the directors.

Subsequent to the adoption of the resolution, a deed conveying the property in question to Louis Miller and Minnie Miller was signed on petitioner's behalf by Louis Miller, as president and attested by Harry A. Miller as secretary. Thereafter the attorney for the Fine's prepared and submitted a draft of a new contract naming the Millers individually, as vendors and this contract after some changes were made was executed on February 26, 1940.

Subsequent to October 1, 1939, Aaron Feiwish, one of the joint lessees drew bank checks payable to the Miller's as follows:

1939		1940	
October 10	$ 100.00	January 5	$1,000.00
November 1	150.00	February 27	500.00
December 8	1,350.00	March 2	1,000.00
December 19	1,000.00	April 2	1,475.00
December 28	1,000.00		
Totals	$3,600.00		$3,975.00

The check of January 5, 1940, in the amount of $1,000.00 was determined by the Tax Court as part of the purchase price of the apartment property and not as rent. The contract of February 26, 1940, provided for a purchase price of $54,500.00. The settlement effected on April 1, 1940, petitioner's exhibit 6, the date the property was transferred, shows payment as follows:

$ 1,000.00—cash heretofore paid.
12,500.00—cash upon transfer of title.
36,000.00—assumption by purchaser of two existing mortgages.
5,000.00—note and mortgage executed in favor of vendors.

After February 26, 1940, the purchaser made payments totaling $2,525. on account of the cash payment due upon the delivery of the deed, and paid the balance, i. e. $9,975.00 on April 1, 1940. The $2,000.00 security deposit paid under the terms of the lease with Aaron and Regina Feiwish, was applied in curtailment of the purchase money note and third mortgage.

The petitioner has transacted no business and has owned no property since the distribution of its assets to the Millers, but has not been formally dissolved. During the period from 1938 to 1940, an accountant engaged by the

petitioner had, on different occasions, recommended that petitioner dissolve and distribute its assets to the stockholders. The Millers had refrained from following the recommendation for the reason that Louis Miller was personally liable for a large indebtedness of a construction business in which he was interested, and he was unwilling to subject the apartment property to his personal obligations. By February, 1940, the debts of the construction business had been paid.

The 1940 return filed for the petitioner reported no taxable gain as having been realized from the sale of its assets. The following statement was typewritten under Schedule K of the return: "This corporation declared a dividend in kind in complete liquidation of all of its assets to its stockholders on February 23, 1940. The property was sold on April 1, 1940, the corporation collecting the rents to the date of sale by the stockholder only." Minnie Miller's 1940 return reported a long term capital gain of $14,526.68 on the exchange of her stock in the petitioner of which amount $7,263.34 was taken into account in computing net income. The following statement in explanation of the amount realized upon disposition of the stock appears: "Represents the fair market value of its (petitioner's) assets distributed to its stockholder by a dividend in kind of February 23, 1940."

At the time of the filing of the return for the year 1940, no accurate records of the petitioner's affairs had been kept. Checks for rent under the Feiwish lease had frequently been made payable to the Millers individually, and at times had been deposited in accounts of other corporations in which the Millers were interested. A net loss was reported in the amount of $1,491.94. From books subsequently prepared by an accountant the loss for the year 1940 was reduced to $450.50. The books cannot be reconciled with the 1940 return in that the return reported in-

come from rent in the amount of $2,125, whereas the books reflect income from rent in the amount of $1,000.00. The 1940 return was filed on March 28, 1941, the Collector of Internal Revenue having granted an extension of time for filing until March 30, 1941. Through inadvertence the 1940 return was not verified by the officers who executed it. The $1,000.00 shown on the books as income from rent in 1940 was determined to have been a payment on the purchase price, and is reflected in the figure representing the profit on the sale.

The petitioner did not include the payment of $1,000.00 as part of the purchase price but included the item as rent from the lessee. The rent due and payable by the lessee under the terms of the lease with the Feiwishes for the period beginning October 1, 1939, and ending January 15, 1940, was $4,500.00. The amount of rent actually paid including the check of January 5, 1940, was $4,600.00. Checks dated October 10 and November 1, 1939, in the amounts of $100.00 and $150.00, respectively, Respondent's Exhibit "E", are made payable to Joseph Miller, who was in no way connected with petitioner, although these amounts are included in income of petitioner. Eliminating these items, the amount of rent actually collected for the period ending January 15, 1940, was only $4,350.00.

IV.

The petitioner on review avers that in the record and proceeding before the Tax Court of the United States and in the opinion and final decision rendered and entered by the Tax Court of the United States, manifest error occurred and intervened to the prejudice of the taxpayer who now assigns the following errors and each of them, which he avers occurred in said record, proceeding and final decision as rendered and entered by the Tax Court of the United States.

The Tax Court of the United States erred:

1. In holding that there was a deficiency income and excess profits tax for the calendar year 1940.

2. In failing to hold that there was no deficiency for the taxable year 1940.

3. In failing to find that the payment of $1,000.00 on January 5, 1940, was for rent.

4. In finding that the payment of $1,000.00 on January 5, 1940, was a part of the purchase price of the property.

5. In failing to amend the findings of fact and opinion pursuant to a motion of petitioner for reconsideration.

6. In denying the motion of petitioner to amend the findings of fact and opinion in that the $1,000.00 paid on January 5, 1940, was paid as rent.

7. In failing to find that a liquidating dividend had not been declared by petitioner before the sale of the Mayfield Court Apartments.

8. In finding that the sale of the Mayfield Court Apartments was effective prior to the actual date of the signing of the contract of sale.

9. In failing to find that the sale of the property was made by Louis Miller and Minnie Miller in their individual capacity.

10. In finding that the sale of the property was made by the petitioner.

11. In failing to follow the decision of this Court in the case of Falcon v. Commissioner, 127 Fed. (2) 277.

12. The decision of the Court is contrary to the evidence and is unsupported by any evidence.

Wherefore, the petitioner on review petitions that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

MAURICE KAY,
Attorney for Petitioner on Review.

Washington, District of Columbia, ss.

Maurice Kay, being duly sworn, deposes and says that he is attorney for the Court Holding Company, the petitioner on review, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

MAURICE KAY.

Subscribed and sworn to before me this 3rd day of December, 1943.

(Sgd.) HELEN B. WELCH,
(Seal) Notary Public.

106 NOTICE OF FILING PETITION FOR REVIEW.

Filed December 13, 1943.

(Title Omitted.)

To the Commissioner of Internal Revenue:

You are hereby notified that the Court Holding Company, a Florida Corporation, did on this 13th day of December, 1943, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of the Tax Court heretofore rendered in the above mentioned cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of December, 1943.

MAURICE KAY,
Attorney for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 13th day of December, 1943.

(Sgd.) J. P. WENCHEL,
Attorney for Respondent on Review.

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107 PRAECIPE.

Filed December 13, 1943.

(Title Omitted.)

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Ap-

peals for the Fifth Circuit, with reference to the petition for review heretofore filed in the above entitled cause, a transcript of the record in said cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record duly certified copies of the following:

1. Docket entries.

2. Pleadings:

(a) Amended petition.

(b) Answer.

(c) Motion for petitioner for reconsideration of findings of fact and opinion.

3. A statement of the evidence submitted to the Tax Court, including:

(a) Petitioners Exhibit No. 1—Lease.

(b) Petitioners Exhibit No. 2—Minutes of the Board of Directors.

(c) Petitioners Exhibit No. 3—Minutes of stockholders meeting.

(d) Petitioners Exhibit No. 4—Deed.

(e) Petitioners Exhibit No. 5—Agreement for deed.

(f) Petitioners Exhibit No. 6—Closing statement.

(g) Defendant's Exhibit No. C—Return of Petition—1940.

(h) Defendant's Exhibit No. D—Return of Minnie Miller—1940.

(i) Defendant's Exhibit No. E—List of checks.

(j) Defendant's Exhibit No. F—Statement of Minnie Miller.

4. Findings of fact and opinion and decision of the Court.

5. Petition for Review.

6. Notices of filing petition for review.

7. This praecipe.

MAURICE KAY,
Attorney for Petitioner on Review.

Service of a copy of the within praecipe is hereby admitted this 13th day of December, 1943.

J. P. WENCHEL,
Attorney for Respondent on Review.

CERTIFICATE.

The Tax Court of the United States,
Washington.

Court Holding Company, a Florida Corporation, Petitioner,
vs. Docket No. 111075.
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, Clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 108, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 3d day of February, 1944.

B. D. GAMBLE,
Clerk, The Tax Court of the United States.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of June 7th, 1944

No. 10976

COURT HOLDING COMPANY

vs.

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by Maurice Kay, Esq., for petitioner, and Miss Muriel S. Paul, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

Opinion of the Court and dissenting opinion of Hutcheson, Circuit Judge, thereto

Filed July 11, 1944

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10976

COURT HOLDING COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States

(July 11, 1944)

Before SIBLEY, HUTCHESON, and LEE, Circuit Judges

SIBLEY, Circuit Judge: For the calendar year 1940 the Commissioner assessed additional taxes growing out of a failure of Court Holding Company to return a gain on a sale of real estate as realized by it, instead of by its stockholders who had returned

it. A fraud penalty was also imposed. The Tax Court held that the sale was to be attributed to the corporation and upheld the tax, but that though an incorrect position in law had been taken by the corporation, there was no suppression of the facts, and a fraud penalty was not justified. The corporation is here contending that it does not owe the tax.

The facts as found by the Tax Court are fully stated in 2 T. C. 531. The Court Holding Company was a mere holding company, having as its only asset a building in Florida called Mayfield Court Apartments. Its only business was the leasing of this building. There were 50 shares of stock, owned 48 by Minnie Miller and 2 by her husband Louis Miller. He was president of the Company and their son Harry Miller was secretary. Minnie Miller was a director. The current lease was for three years, beginning Oct. 1, 1938, and the rental was due $2,000 Oct. 1, $1,000 Dec. 15, $1,500 Jan. 15, $2,000 Feb. 1, $2,000 Feb. 20, for each year. There was an initial deposit also of $2,000 to secure general performance of the lease. During the fall of 1939 the lessees Aaron and Regina Feiwish, and a sister and her husband named Fine, began negotiations to buy the property. During February 1940, Louis Miller, the corporation's president, and the Fines orally agreed on a sale at a price of $54,500, and on Feb. 23 they met in the office of a lawyer employed by the Fines to make and execute a written contract, Harry Miller, the corporation's secretary, also being present. The attorney prepared a written contract, but it was never executed. The property had been bought during the depression at a low price at judicial sale, and the Millers were advised that if the corporation sold and realized the gain and then distributed it to its stockholders, very heavy and duplicated income taxation would result. On Feb. 23rd they notified the Fines that the corporation could not consummate the sale for the reason that very large income taxes would result. That afternoon the three directors of the corporation met with their accountant, and in a formal directors' meeting resolved that the corporation should "declare a dividend payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." A resolution was then passed declaring the dividend, "payable in all the assets of the corporation (describing the building and its equipment), subject to a first mortgage * * * and a second mortgage * * * and further subject to a lease between the corporation and Aaron and Regina Feiwish * * * in complete liquidation and surrender of all the corporate stock of the corporation, held by Louis and Minnie Miller." A formal stockholders' meeting was then held in which the resolution of the directors was

ratified and confirmed, Louis Miller and Minnie Miller both signing the minutes. Thereafter on the same afternoon the corporation executed its deed covering the property to Louis Miller and Minnie Miller, which was duly recorded. On Feb. 26 the Fines' attorney on request of the Millers drew a new contract providing for the same purchase price and conditions that had been agreed on Feb. 23, except for a correction in the balance due on one of the mortgages to be assumed, and this contract was executed by Louis and Minnie Miller as sellers and Mrs. Fine as purchaser. The contract recited the payment down of $1,000, and that if the title was approved other payments were to be made, and credit allowed for the $2,000 on deposit to secure the lease. The Tax Court finds that the $1,000 paid down was the application of a check for $1,000 paid January 5 by Aaron Feiwish to the Millers, but whether originally as a loan or for rent is not stated. The $2,000 deposit to secure the lease also belonged to the lessees, and their consent to the surrender of the lease had to be obtained. The record is silent as to how these matters were arranged, but evidently the lessees and their sister, Mrs. Fine, had an understanding about them. Title was finally transferred by the Millers to Mrs. Fine on April 1, 1940. The corporation has owned no property since the transfer of its assets, and has done no business, but was not formally dissolved, the Florida law holding it intact for a time to settle its affairs.

The Tax Court concluded on these facts that the sale was really made by the corporation, that the transfer of the property to the stockholders "was in fact subject to the petitioner's prior agreement to sell, and the sale, although in form by the stockholders, was in reality in performance of the agreement." We think this conclusion not sustainable.

In Florida an agreement to sell land is unenforcible unless evidenced by a writing (Comp. Gen. Laws of 1927, Sec. 5779). The $1,000 paid on January 5th, and finally applied on the purchase, as the tax court found, could not then have been a payment on a contract of purchase, because no agreement to sell had been reached till late in February; but if so considered, because later so applied with Feiwish's consent, under the Florida law a part payment would give no validity to an oral contract to sell land (Tate vs. Jones, 16 Fla. 217; Williams vs. Bailey, 69 Fla. 225, 67 So. 877; Maloy vs. Boyett, 53 Fla. 956, 43 So. 243; Fireman's Fund Ins. Co. vs. Craven, 101 Fla. 155, 134 So. 232). The corporation was never bound by any writing. It was free on Feb. 23 to declare that it would not go forward with the sale, for any reason or no reason. It did so declare, and thereafter there was not even an oral contract.

There was no sale agreement binding the property subject to which the Millers took title. The corporate minutes show that they took subject to two mortgages and the lease, and to nothing else. They were free to sell or not sell. They were free if they chose to propose, as they did, to sell on the same terms which had been before discussed. Mrs. Fine was in nowise bound to buy, but she too was free so to agree.

As we see it, the controlling fact is that there was no binding agreement to sell made by the corporation, and even the oral agreement was called off. The Millers wished to sell the property and realized their gain. It could lawfully be done in either of two ways: (1) The corporation could sell and distribute the gain; or (2) the corporation could liquidate, transfer the property to its stockholders, and they could sell. The tax consequences were more favorable under the latter plan. The Millers found this out in time, before the corporation became bound to sell, and followed the latter plan. The corporation was actually and fully liquidated. It had after Feb. 23 neither property, business, nor capital stock. This of course was all done to avoid heavy corporation taxes, but the purpose to escape or reduce taxation in making such a choice of procedure is not unlawful. The procedure actually followed is taxable by the law applicable to it (United States vs. Isham, 17 Wall. 496; Gregory vs. Helvering, 293 U. S. 465; Chisholm vs. Commissioner, 79 Fed. (2) 14). This case like Commissioner vs. Falcon Co., 127 Fed. (2) 277, rather than Trippett vs. Commissioner, 118 Fed. (2) 765. The Millers have paid taxes on the gain realized as individuals. The defunct corporation cannot rightly be resurrected to be taxed for a sale it did not make. The tax ought to be redetermined accordingly. The case is remanded to this end.

Judgment reversed.

HUTCHESON, Circuit Judge, dissenting:

This is another of those border line tax avoidance cases in which it is only by the skin of its teeth, if at all, that a family holding corporation has escaped taxes on a sale of its property by the device of a deed in liquidation to its two stockholders so that they in turn might deed it to the purchaser. The facts are fairly and fully set out in the opinion of the Tax Court, 2 T. C. 531. I will not restate them here. It is sufficient to say that it was in effect found with full support in the record, (1) that the taxpayer entered into an oral contract with the purchaser, with all of the terms of the sale agreed on, one of them being that a part of the rent already paid should be credited on the purchase price, (2)

that, at the last minute, and admittedly for the sole purpose of avoiding taxes, it concluded to consummate the sale not by deeding the property direct to the purchaser, as it had at first planned, but by a deed in pretended liquidation to its two stockholders who were to carry out the corporation's contract by deeding it to the purchaser, and (?) that, using the stockholders as a conduit, it carried out its sale to the purchaser exactly as it had agreed to do.

Standing not as Falcon [1] did, with a finding of the Tax Court in its favor, but as Trippett [2] did, with a finding against it, petitioner insists that the undisputed facts established that the sale, which the Tax Court finds was made by the corporation, was in fact made by the stockholders, and that a judgment for the taxpayer is demanded. It points to the fact that though the negotiations for the sale were conducted by its stockholders in its name, and the sale was made to the purchaser on the same terms and conditions as those it had agreed to, no binding agreement for a deed and no deed to the purchaser was executed by taxpayer. Citing Commissioner v. Falcon, 127 F. (2) 277, it insists that the Tax Court has in effect affirmed what the courts have uniformly denied, that the motive of tax avoidance can make taxable a transaction that motive absent would be without tax consequences. Arguing that it had a right, to negotiate for the sale, to come up to the very point of closing, and then, not being legally bound to go forward, to decline to sell, it insists that it did actually decline to sell, and having done so, it was entirely competent for it to transfer the property in liquidation to its stockholders and for them to negotiate with and sell the property to the same purchaser on the same terms and conditions. I agree with petitioner that this could have been done. I cannot agree that the record demands a finding that this was done. I think it fully supports the finding of the Tax Court that Mrs. Miller with her husband, the sole owners of the corporation, arranged for it to make a sale to the purchaser, and that it agreed to do so. As part of that arrangement, it was agreed that part of the money which had been paid the taxpayer as rent should be credited on the sale price and though the sale finally took the form of a deed in liquidation to her and her husband and a deed from them, this was not the substance of what occurred. This, as found by the Tax Court, was that the corporation should go ahead with the transaction as agreed, except that, instead of executing its own deed direct to the purchaser, it would make the sale through the medium and agency of its sole stockholders. Thus the title, passing first into them, could go through them as a con-

[1] Commissioner v. Falcon, 127 F. (2) 277.
[2] Trippett v. Commissioner, 118 F. (2) 765.

duit into the purchaser for the purpose of precisely carrying out the agreement, morally if not legally binding, which the taxpayer had made through their agency, and through their agency carried out.

It is settled law that neither the motive nor the effort to avoid tax consequences will of itself make a taxable transaction out of one which is not in law taxable, but evasion and avoidance are near allied, and thin partition walls their bounds divide.[1] The determination, therefore, whether a transaction of this kind was one of a real refusal of the corporation to sell, a real liquidation, re-negotiation with the purchaser by the stockholders, or was a sham refusal and a carrying out of the original plan through the stockholders as agents, presents a field for fact finding, a field in short in which the finding of the Tax Court is controlling. If the evidence showed only that the negotiations had been begun by the Millers on behalf of the corporation and had proceeded to the point of oral agreement, and that then it had been decided that the corporation would not make the deed, the Tax Court might have inferred as a fact that its subsequent action in deeding the property in liquidation and the action of its stockholders in selling to its customer was the result of a bona fide and complete abandonment by the corporation of its purpose to sell and a renewal of negotiations followed by a sale by the stockholders, or it might have inferred that these facts exhibited a purpose not to abandon the sale but to proceed with and accomplish it by a tax saving device. By either fact inference, this Court would have been bound (Cf. Dodson v. Commissioner, 320 U. S. 489). But the record shows more than this in support of the inference the Tax Court drew. It shows in addition that, as a part of the terms of the sale, the lease arrangements taxpayer had made were taken into account in the sale and that a part of the money paid to and received by the corporation as rental prior to the consummation of the sale was to be, and was, credited to the purchaser on the purchase price. Mrs. Miller so testified. No one disputed her testimony. Indeed, the testimony of the government agents as to what she told them corroborates it. I think, therefore, that it must be held not only that the evidence sustains the finding of the Tax Court, but that it would be hard under this record to sustain any other finding. I respectfully dissent from the judgment of reversal.

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[1] Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319; Gregory v. Helvering, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355; Taylor Oil & Gas Co. v. Commissioner, 5 Cir., 47 F. (2) 108; Embry Realty Co. v. Glenn, 6 Cir., 116 F. (2) 682; Trippett v. Commissioner, 5 Cir., 118 F. (2) 764.

Judgment

Extract from the Minutes of July 11, 1944

No. 10976

COURT HOLDING COMPANY
vs.
COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Court Holding Company for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the judgment of the said Tax Court of the United States in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said Tax Court of the United States for proceedings in accordance with the opinion of this Court.

HUTCHESON, Circuit Judge, dissents.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 117 to 127, next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 10976, wherein Court Holding Company is petitioner, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 116, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of September A. D. 1944.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit,
By E. WENDLING,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1944

Supreme Court of the United States

Order allowing certiorari

Filed November 20, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 581

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COURT HOLDING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on July 11, 1944, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 86–102) is reported in 2 T. C. 531. The opinion of the circuit court of appeals (R. 117–122) is reported in 143 F. 2d 823.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 11, 1944 (R. 123). The

jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court committed reversible error in holding that a sale, formally made by the corporate taxpayer's two shareholders, was, in substance, a sale by the taxpayer the gain from which was attributable to it.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 22).

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (a)–19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of

the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

* * * * *

SEC. 19.22 (a)–21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19.52–2.)

STATEMENT

The facts as found by the Tax Court (R. 87–93) may be summarized as follows:

Taxpayer, a Florida corporation, was organized in 1934 to acquire title, at a foreclosure sale, to an apartment building in Miami Beach. This was its only asset. Of its fifty shares outstanding, forty-eight were owned by Minnie Miller and the other two by her husband, Louis Miller. In 1938, taxpayer leased the building to Aaron and Regina Feiwish for three years commencing October 1, 1938. Some time after October 1, 1939, the Feiwishes, together with a sister and brother-in-law of Mr. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. In February 1940, Louis Miller, acting as president of taxpayer, agreed to sell and the Fines agreed to purchase the property for $54,500. The terms of sale were agreed upon, and on February 22, 1940, the parties and their attorneys met for the purpose of having the oral agreement reduced to writing and executed. The attorney for the Fines prepared a contract embodying the terms of the oral agreement, but the writing was never executed by the corporation. Either at the meeting of February 22, or within the next two days, taxpayers' attorney advised the purchaser that taxpayer could not consummate the sale, for the reason that it would result in the imposition of a large income tax (R. 87–89).

On February 23, 1940, taxpayer's attorney and accountant met with Minnie and Louis Miller, and

Harry Miller, their son (R. 84). The three Millers, constituting all of taxpayer's directors, then held a special meeting at which it was resolved that "it would be in the best interest of the corporation to have it declare a dividend payable in the assets of the corporation, in complete liquidation and surrendor of all the outstanding corporate stock." Immediately thereafter, Louis and Minnie Miller, as stockholders, held a special meeting and adopted a resolution ratifying the action of the directors. On the same afternoon, subsequent to adoption of these resolutions, a deed conveying taxpayer's property to Louis and Minnie Miller jointly was executed on taxpayer's behalf by Louis Miller as president, and attested by Harry Miller as secretary. Thereafter, the attorney for the purchaser was notified of the change in title and was requested to prepare a new contract naming the Millers individually as vendors. The contract was drawn, providing for the same purchase price and embodying the same terms and conditions as had been previously agreed upon at the meeting of February 22nd, except for a correction in the amount stated to be the unpaid balance of an existing mortgage to which the sale was subject. It was executed by the Millers as vendors and by Margaret W. Fine as purchaser on February 26, 1940. The deed from taxpayer to the Millers was recorded the same day (R. 89–90).

The contract between the Millers and Mrs. Fine recited the receipt of a down payment of $1,000; this represented a credit against the purchase price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940. The balance of the purchase price, amounting to $53,500, was payable in the amount of $12,500, in cash, upon closing, by the assumption of an existing first and second mortgage, and the execution of a purchase money note and third mortgage. Two thousand dollars which had been deposited with taxpayer by the Feiwishes as security for performance of the lease was applied in reduction of the purchase money note and third mortgage (R. 90–91). Taxpayer has transacted no business nor owned any property since the liquidation distribution, but has not been formally dissolved (R. 91).

In its 1940 return, taxpayer reported no gain as having been realized from the sale. In her individual return for 1940, Minnie Miller reported a long-term capital gain on the exchange of her stock for taxpayer's assets, of which fifty percent was taken into account. The Commissioner determined that taxpayer realized a taxable gain on the sale and computed a deficiency accordingly (R. 91–93). The Tax Court affirmed his determination (R. 94–101). The circuit court of appeals reversed, one judge dissenting (R. 117–122).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In substituting its view of the facts for those found by the Tax Court.

2. In holding that the Tax Court was required, as a matter of law, to find that the sale was made by taxpayer's stockholders.

3. In holding that any formally perfect liquidation distribution by a corporation must be recognized for tax purposes, even though the distribution has no reality or business substance and is admittedly resorted to solely for tax avoidance purposes.

4. In failing to apply to the facts of this case the established principle that the substance rather than the form of a transaction is determinative of its tax consequences.

5. In reversing the judgment of the Tax Court.

REASONS FOR GRANTING THE WRIT

The issue in this case was succinctly stated and resolved by the Tax Court as follows (R. 96):

> The facts then may be narrowed down to this: The petitioner having entered into an oral contract to sell its property, and having received payment of part of the agreed price, at the last moment, and admittedly for the sole purpose of avoiding taxes, distributed the property to its stockholders, who promptly thereupon bound themselves in writing to perform individ-

> ually the act which they had theretofore agreed to perform as a corporation. Under such circumstances we think it must be said that the Millers were carrying out the agreement made by the corporation and not an agreement made by themselves individually.

In reversing the Tax Court, the circuit court of appeals rested its decision upon what appear to be two incompatible "controlling" factors (R. 119–120): (1) That taxpayer "called off" the oral agreement (on this assumption the stockholders entered into and consummated an independent agreement of their own, since a sale concededly occurred); (2) that taxpayer did not legally "bind" itself in writing and, accordingly, was "free" to declare that it would not "go forward with the sale" in its own name but could pass title to its stockholders, in the form of a liquidation distribution, for the sole purpose of enabling them to go forward upon the "same terms" in their own names. On this hypothesis, of course, the oral agreement was not abandoned; the stockholders merely consummated individually the agreement they had negotiated on behalf of the corporation and all that was "called off" was the identity of the vendor.

On either premise, the decision below is in conflict with established principles laid down by this Court and with decisions of other circuit courts of appeals.

1. Insofar as the decision below is premised on the fact that the oral agreement was abandoned, it violates the settled principle that it is the function of the Tax Court, not the circuit court of appeals, to weigh the evidence and find the facts. *Dobson v. Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231; *Wilmington Co.* v. *Helvering,* 316 U. S. 164. In assuming that the oral agreement was "called off", the majority of the court below substituted its own view of the facts for that of the Tax Court. For the Tax Court had concluded that the stockholders "were carrying out the agreement made by the corporation and not an agreement made by themselves individually"; that "it was always intended and understood by the parties that the sale would be made exactly as agreed by the petitioner, except for the change in identity of the vendor"; that "consummation of the oral agreement was the substantive purpose" of the ensuing liquidation distribution and substitution of the stockholders as nominal vendors (R. 96); that the stockholders acted as agents of the corporation in consummating the agreement (R. 97); and that "the sale, although in form by the stockholders, was in reality in performance of the prior agreement" (R. 101).

Again, in assuming that the corporation was "actually" liquidated (R. 120), the majority of the court below likewise substituted its own view of the facts for that of the Tax Court. For the

Tax Court concluded (R. 96–97) that the resolutions to liquidate and the liquidation distribution were not bona fide but "were formal devices to which resort was had only in the attempt to make the transaction appear to be other than what it was." And in reaching the ultimate conclusion that the sale was in fact and substance a sale by the stockholders individually, the court below replaced the inference drawn by the Tax Court with its own.

We submit that the applicable principle was stated in the dissenting opinion below (R. 122):

> The determination, therefore, whether a transaction of this kind was one of a real refusal of the corporation to sell, a real liquidation, re-negotiation with the purchaser by the stockholders, or was a sham refusal and a carrying out of the original plan through the stockholders as agents, presents a field for fact finding, a field in short in which the finding of the Tax Court is controlling.

2. Insofar as the decision below is predicated on the fact that taxpayer did not execute a binding written agreement in its own name, it violates the principle, affirmed by this Court in a variety of contexts, that tax consequences flow from the substance of a transaction, not the form in which it is cast. *Gregory* v. *Helvering,* 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Griffiths* v. *Commissioner,* 308 U. S.

355; *Higgins* v. *Smith,* 308 U. S. 473; *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44; *Lucas* v. *Earl,* 281 U. S. 111; *United States* v. *Phellis,* 257 U. S. 156. In applying the maxim that the reach of the income tax law is not to be delimited by refinements of title, this Court has uniformly held that income may be realized despite an anticipatory arrangement which prevents its passage into the taxpayer's hands. *Harrison* v. *Schaffner,* 312 U. S. 579; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Helvering* v. *Clifford,* 309 U. S. 331; *Douglas* v. *Willcuts,* 296 U. S. 1; *Burnet* v. *Leininger,* 285 U. S. 136; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716. To hold, as did the court below, that a corporation which has orally agreed to sell its assets and has received part of the purchase price may escape tax liability on the gain resulting from the sale by conveying title to the purchaser via its controlling stockholders, exalts artifice above reality. And to consider the "controlling" fact to be that the corporation refrained from legally binding itself by a written agreement[1] sanctions, we believe, the

[1] The rationale of the decision below would apply with equal force in a situation where, after the corporation had executed a binding sales contract, it mutually agreed with the purchaser to rescind so as to render it "free" to make a liquidation distribution to its stockholders and substitute the stockholders as nominal vendors. The purchaser's agreement could be readily secured since acquisition of good title, not the identity of the vendor, is the purchaser's only concern.

kind of formalism which this Court has consistently refused to recognize as effectual to alter tax liability.

No valid reason exists for regarding the instant transaction as immune from operation of the doctrine enunciated in the above cases, and none was suggested in the opinion below. It is not enough to point out, as did the court below (R. 120), that a taxpayer may minimize taxes by any lawful means. The boundaries of tax avoidance do not encompass resort to legal mechanisms having no legitimate business object and designed solely to disguise the substance of the challenged tax event. The crucial question which remains, and to which the majority of the court below failed to address itself, is whether the transaction under scrutiny is in fact what it appears to be in form. The statute contemplates that if a corporation sells its property it is taxable on the resultant gain. Internal Revenue Code, Section 22 (a), *supra,* p. 2; Section 19.22 (a)-19 of Treasury Regulations 103, *supra,* pp. 2-3. On the other hand, a corporation may, without incurring tax liability, distribute its assets in kind in complete or partial liquidation, though the assets have appreciated in value since their acquisition. Section 19.22 (a)-21 of Treasury Regulations 103, *supra,* p. 3. In relieving the corporation of tax liability upon a distribution in liquidation of appreciated assets, the statute

is patently aimed at a bona fide distribution; it was not intended to embrace a distribution which, though technically perfect and literally complying with the statute, is designed to cloak what is in reality a sale to a third party.

The record here unquestionably warrants the Tax Court's conclusion that what substantially occurred was a sale by taxpayer to a third party. For quite apart from taxpayer's admission that the sole purpose of the distribution in liquidation was tax avoidance, the conclusion is irresistible that the circuitous routing of the title to the purchaser via the stockholders was without reality or business substance. The corporate assets were not received by the stockholders to hold or use as their own, even temporarily, nor in proportion to their stock holdings. The stockholders took title, through a paper liquidation distribution, only to substitute themselves individually as vendors under the written contract embodying the self-same oral agreement they had negotiated and reached on behalf of their corporation. Amounts paid to the corporation as rent and as a security deposit under an outstanding lease of the property were credited against the purchase price, while the balance of the price was made payable to the stockholders. Not a single practical result was achieved by the stockholders' receiving transitory legal ownership and acting as conduit of the title which would not have been reached had the tax-

payer simply and directly carried out its oral agreement, received the entire purchase price, and distributed the proceeds to its stockholders in liquidation.

In *Higgins* v. *Smith,* 308 U. S. 473, and *Griffiths* v. *Commissioner,* 308 U. S. 355, this Court refused to permit controlling stockholders to use the corporate entity to avoid individual taxes. Although this case presents, conversely, the tax liability of the controlled corporation, the broad principles underlying the decisions in those cases are applicable here. The attendant tax disadvantages of electing to do business as a corporation, which this Court in the *Smith* case indicated must be accepted by the stockholders, 308 U. S. at 477, include the tax burdens falling upon their controlled corporation. Cf. *Moline Properties* v. *Commissioner,* 319 U. S. 436; *Burnet* v. *Commonwealth Imp. Co.,* 287 U. S. 415.

In *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44, this Court held that the umbilical cord between a corporation and its stockholders is not severed merely because the corporation transfers its property under a contract which vests all rights thereunder directly in the stockholders; though the corporation has removed itself as conduit of the proceeds, the right of the stockholders remains derivative. The anticipatory arrangement there condemned is little different, in substance and from the tax viewpoint, from that em-

ployed here. That taxpayer here invoked a "straw" distribution in liquidation as part of the arrangement can hardly suffice to insulate it from ownership of the portion of the purchase price which the purchaser paid directly to the stockholders.

3. The decision below is in conflict with decisions by other circuit courts of appeals holding that where controlling stockholders of a corporation who have negotiated for the sale of corporate assets cause the corporation to transfer the assets to themselves (either by way of a "liquidation distribution" or a "sale"), and then consummate the sale individually, corporate tax liability is not foreclosed by the form of the transaction but the court will look to its substance to discover whether the sale was in fact made by the corporation. *Meurer Steel Barrel Co.* v. *Commissioner* (C. C. A. 3d), decided July 21, 1944 (1944 P-H, Federal Tax Service, par. 9423); *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6th); *S. A. MacQueen Co.* v. *Commissioner,* 67 F. 2d 857 (C. C. A. 3d); *Trafford Oil & Gas Co.* v. *Commissioner,* 78 F. 2d 814 (C. C. A. 3d), certiorari denied, 296 U. S. 630; *Liberty Service Corp.* v. *Commissioner,* 77 F. 2d 94 (C. C. A. 3d); *Nace Realty Co.* v. *Commissioner,* 28 B. T. A. 467, affirmed *per curiam* April 13, 1935 (C. C. A. 6th). It also conflicts in principle with decisions by other circuit courts of appeals holding that where a corporation, in the

course of liquidation, transfers its property to a trustee or agent for its stockholders, who thereafter sells the property, the sale is attributable to the corporation. *Hellebush* v. *Commissioner*, 65 F. 2d 902 (C. C. A. 6th); *Tazewell Electric Light & Power Co.* v. *Strother*, 84 F. 2d 327 (C. C. A. 4th); *Northwest Utilities Securities Corp.* v. *Helvering*, 67 F. 2d 619 (C. C. A. 8th), certiorari denied, 291 U. S. 684; *First Nat. Bank of Greeley, Colo.* v. *United States*, 86 F. 2d 938 (C. C. A. 10th); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. 2d 906 (C. C. A. 4th). See also Section 19.22 (a)-21 of Treasury Regulations 103, *supra*, p. 3, which provides that sales made by trustees in dissolution are to be treated as if made by the corporation.

4. Resolution of the conflict is of considerable practical importance. The decision below removes a traditional field of fact finding from the province of the Tax Court by requiring it, as a matter of law, to give effect to a sham sale by the stockholders, thus disregarding the limitations on judicial review established by *Dobson* v. *Commissioner, supra.* It is broad enough to apply to both complete and partial liquidations, and affords a ready means of tax avoidance, particularly by family corporations. It is also an invitation to controlling stockholders who have reached an agreement to sell (or otherwise dispose of) corporate assets to cause the corporation to make a last moment "liquidation distribution"

of the property to themselves and to consummate the sale individually, for the single avowed purpose of escaping the corporate tax. The decision of the court below leaves the Tax Court with a confusing array of conflicting principles by which to guide itself.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1944

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COURT HOLDING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Tax Court (R. 86–102) is reported in 2 T. C. 531. The opinion of the Circuit Court of Appeals (R. 117–122) is reported in 143 F. 2d 823.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 11, 1944 (R. 123.) The petition for a writ of certiorari was filed on October 11, 1944, and was granted on November 20, 1944 (R. 124). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court committed reversible error in holding that a sale, formally made by the corporate taxpayer's two shareholders, was, in substance, a sale by the taxpayer, the gain from which was attributable to it.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 22)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (a)–19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in

which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

* * * * *

SEC. 19.22 (a)–21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44–5. (See further section 19.52–2.)

STATEMENT

The facts as found by the Tax Court (R. 87–93) may be summarized as follows:

Taxpayer, a Florida corporation, was organized in 1934 to acquire title, at a foreclosure sale, to an apartment building in Miami Beach. This

was its only asset. Of its fifty shares outstanding, forty-eight were owned by Minnie Miller and the other two by her husband, Louis Miller. In 1938, taxpayer leased the building to Aaron and Regina Feiwish for three years commencing October 1, 1938. Some time after October 1, 1939, the Feiwishes, together with a sister and brother in-law of Mrs. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. In February, 1940, Louis Miller, acting as president of taxpayer, agreed to sell and the Fines agreed to purchase the property for $54,500. The terms of sale were agreed upon, and on February 22, 1940, the parties and their attorneys met for the purpose of having the oral agreement reduced to writing and executed. The attorney for the Fines prepared a contract embodying the terms of the oral agreement, but the writing was never executed by the corporation. Either at the meeting of February 22, or within the next two days, taxpayer's attorney advised the purchaser that taxpayer could not consummate the sale, for the reason that it would result in the imposition of a large income tax. (R. 87–89.)

On February 23, 1940, taxpayer's attorney and accountant met with Minnie and Louis Miller, and Harry Miller, their son (R. 84). The three Millers, constituting all of taxpayer's directors, then held a special meeting at which it was re-

solved that "it would be in the best interest of the corporation to have it declare a dividend payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." Immediately thereafter, Louis and Minnie Miller, as stockholders, held a special meeting and adopted a resolution ratifying the action of the directors. On the same afternoon, subsequent to adoption of these resolutions, a deed conveying taxpayer's property to Louis and Minnie Miller jointly was executed on taxpayer's behalf by Louis Miller as president, and attested by Harry Miller as secretary. Thereafter, the attorney for the purchaser was notified of the change in title and was requested to prepare a new contract naming the Millers individually as vendors. The contract was drawn, providing for the same purchase price and embodying the same terms and conditions as had been previously agreed upon at the meeting of February 22, except for a correction in the amount stated to be the unpaid balance of an existing mortgage to which the sale was subject. It was executed by the Millers as vendors and by Margaret W. Fine as purchaser on February 26, 1940. The deed from taxpayer to the Millers was recorded the same day. (R. 89–90.)

The contract between the Millers and Mrs. Fine recited the receipt of a down payment of $1,000; this represented a credit against the purchase

price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940. The balance of the purchase price, amounting to $53,500, was payable in the amount of $12,500 in cash upon closing, by the assumption of an existing first and second mortgage, and the execution of a purchase money note and third mortgage. Two thousand dollars which had been deposited with taxpayer by the Feiwishes as security for performance of the lease was applied in reduction of the purchase money note and third mortgage. Taxpayer has transacted no business nor owned any property since the liquidation distribution, but has not been formally dissolved. (R. 90–91.)

In its 1940 return, taxpayer reported no gain as having been realized from the sale. In her individual return for 1940, Minnie Miller reported a long-term capital gain on the exchange of her stock for taxpayer's assets, of which fifty percent was taken into account. The Commissioner determined that taxpayer realized a taxable gain on the sale and computed a deficiency accordingly (R. 91–93). The Tax Court affirmed his determination (R. 93–101). The Circuit Court of Appeals reversed, one judge dissenting (R. 117–122).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In substituting its view of the facts for those found by the Tax Court.

2. In holding that the Tax Court was required, as a matter of law, to find that the sale was made by taxpayer's stockholders.

3. In holding that any formally perfect liquidation distribution by a corporation must be recognized for tax purposes, even though the distribution has no reality or business substance and is admittedly resorted to solely for tax avoidance purposes.

4. In failing to apply to the facts of this case the established principle that the substance rather than the form of a transaction is determinative of its tax consequences.

5. In reversing the judgment of the Tax Court.

SUMMARY OF ARGUMENT

The Tax Court concluded that the real vendor was taxpayer corporation, not its two stockholders. In reversing, the court below rested its decision upon two inconsistent grounds: (1) Taxpayer "called off" its oral sale agreement and made a bona fide liquidation distribution to its stockholders; (2) taxpayer refused to bind itself in writing, and was therefore legally "free" to consummate the same oral agreement by passing title to its stockholders, in the form of a liquidation distribution, for the sole purpose of enabling the latter to substitute themselves individually as vendors. On either premise the court below erred.

To the extent that the decision below is predicated on the assumption that taxpayer abandoned

the oral agreement and made a genuine liquidation distribution, it violates the settled principle that it is the function of the Tax Court, not the Circuit Court of Appeals, to find the facts and draw inferences from them. The Tax Court made a directly contrary finding and the record unquestionably supports its determination. In substituting its own view of the facts for that of the Tax Court, the court below disregarded the limitations upon the scope of appellate review repeatedly expressed by this Court.

To the extent that the decision below rests on the theory that taxpayer was free to consummate the same oral agreement, for tax avoidance purposes, by routing title to the purchaser via a liquidation distribution to its stockholders, it violates the established principle, affirmed by this Court in a variety of contexts, that tax consequences flow from the substance of a transaction, not the form in which it is cast. The boundaries of tax avoidance do not encompass resort to legal mechanisms having no business object and designed solely to disguise a taxable event. In relieving corporations of tax liability upon a liquidation distribution of appreciated assets in kind, the applicable regulation is patently aimed at real liquidations; the relief was not intended to benefit a corporation which effects a "straw" liquidation distribution for the single avowed tax-avoidance purpose of having its stockholders act

as conduits of title to a purchaser already found upon terms of sale already agreed upon. The circuitous manner in which the sale was here consummated did not as a matter of law preclude the Tax Court from finding that the sale was in fact made by taxpayer. Whether the liquidation distribution was real or a sham is a question of fact within the province of the Tax Court to determine.

ARGUMENT

Section 22 (a) of the Internal Revenue Code, *supra*, p. 2, broadly defines gross income as including gains from sales of property. Section 19.22 (a)–19 of Treasury Regulations 103, *supra*, pp. 2–3, provides that "If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive." Section 19.22 (a)–21 of the same regulations provides that "No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."[1]

[1] Provisions corresponding to Sections 19.22 (a)–19 and 19.22 (a)–21 of Regulations 103 appeared in the regulations issued under the successive revenue acts since the 1918 Act; as Section 22 (a) to which they apply has remained substantially the same, they are deemed to have received Congressional approval. *Helvering* v. *Winmill*, 305 U. S. 79, 82–83.

The issue in this case was succinctly stated and resolved by the Tax Court as follows (R. 96):

> The facts then may be narrowed down to this: The petitioner having entered into an oral contract to sell its property, and having received payment of part of the agreed price, at the last moment, and admittedly for the sole purpose of avoiding taxes, distributed the property to its stockholders, who promptly thereupon bound themselves in writing to perform individually the act which they had theretofore agreed to perform as a corporation. Under such circumstances we think it must be said that the Millers were carrying out the agreement made by the corporation and not an agreement made by themselves individually.

In reversing the Tax Court, the Circuit Court of Appeals rested its decision upon a combination of two incompatible "controlling" factors (R. 119–120): (1) That taxpayer "called off" the oral agreement. On this assumption the stockholders entered into and consummated an independent agreement of their own, since a sale concededly occurred. (2) That taxpayer did not execute a legally "binding" written agreement and, accordingly, was "free" to declare that it would not "go forward with the sale" in its own name but could pass title to its stockholders, in the form of a liquidation distribution, for the sole purpose of enabling them to go forward upon the "same terms" in their own names. On this hypothesis,

of course, the oral agreement was not abandoned; the stockholders merely consummated individually the agreement they had negotiated on behalf of the corporation and all that was "called off" was the identity of the vendor.

On either premise, we submit, the court below erred in reversing the Tax Court's decision.

I

THE COURT BELOW DISREGARDED ESTABLISHED PRINCIPLES GOVERNING THE SCOPE OF APPELLATE REVIEW OF TAX COURT DECISIONS BY ASSUMING, CONTRARY TO THE TAX COURT'S FINDINGS, THAT TAXPAYER ABANDONED ITS ORAL AGREEMENT AND EFFECTED A BONA FIDE LIQUIDATION

Insofar as the decision below is premised on the inference that taxpayer abandoned the oral agreement and made a bona fide liquidation distribution, it violates the settled principle that it is the function of the Tax Court, not the Circuit Court of Appeals, to weigh the evidence, find the facts, and draw inferences from the facts. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231; *Wilmington Co.* v. *Helvering,* 316 U. S. 164, 168; *Commissioner* v. *Scottish American Investment Co.,* decided by this Court December 4, 1944, not yet reported.

In assuming that the oral agreement was "called off" (R. 120), the majority of the court below substituted its own view of the facts for that of

the Tax Court. For the Tax Court had concluded that the stockholders "were carrying out the agreement made by the corporation and not an agreement made by themselves individually"; that "it was always intended and understood by the parties that the sale would be made exactly as agreed by the petitioner, except for the change in identity of the vendor"; that "consummation of the oral agreement was the substantive purpose" of the ensuing liquidation distribution and substitution of the stockholders as nominal vendors (R. 96); that the stockholders acted as agents of the corporation in consummating the agreement; that "the contract which was executed and the sale which was consummated were in substance the petitioner's contract and sale" (R. 97); and that "the sale, although in form by the stockholders, was in reality in performance of the prior agreement" (R. 101).

In assuming that the corporation was "actually" liquidated (R. 120), the majority of the court below likewise substituted its own view of the facts for that of the Tax Court. For the Tax Court had concluded (R. 96–97) that the resolutions to liquidate and the liquidation distribution were not bona fide but "were formal devices to which resort was had only in the attempt to make the transaction appear to be other than what it was".

The statement of the majority of the court below (R. 120) that the corporation was "defunct"

and could not be "resurrected to be taxed for a sale it did not make" begs the point at issue, ignores the Tax Court's finding (R. 91) that taxpayer has not been formally dissolved, and is also at variance with its own previous observation (R. 119) that under Florida law the corporation remains "intact for a time to settle its affairs".[2]

And in reaching the ultimate conclusion that the sale was in fact and substance a sale by the stockholders individually, the majority of the court below replaced the inference drawn by the Tax Court with its own.

We submit that the correct view of the case was that stated in the dissenting opinion below (R. 122):

> The determination, therefore, whether a transaction of this kind was one of a real refusal of the corporation to sell, a real liquidation, re-negotiation with the purchaser by the stockholders, or was a sham refusal and a carrying out of the original plan through the stockholders as agents, presents a field for fact finding, a field in short in which the finding of the Tax Court is controlling.

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[2] Whether taxpayer was dissolved manifestly has no bearing on the question whether it was the real vendor. If, as the Tax Court found, taxpayer made the sale, it is liable for tax on the gain, and its stockholders, as transferees of its assets, could be compelled to discharge the unpaid corporate tax. *Phillips* v. *Commissioner*, 283 U. S. 589. See also infra, p. 28.

There can be no question here that there is a substantial basis in the evidence for the Tax Court's determination. The evidence shows that by February 22, 1940 all of the terms of a sale of taxpayer's property had been agreed upon with the purchaser, Margaret W. Fine, who was acting on behalf of the Feiwishes, the lessees of the property; that the parties and their representatives met that day at the office of the purchaser's attorney to execute a written contract embodying the oral agreement; and that taxpayer then refused to execute a written contract, giving as its reason that the sale would result in the imposition of a large income tax (Testimony of Schwartz, attorney for taxpayer (R. 26); Myers, attorney for the purchaser (R. 33); H. A. Miller (R. 26); L. Miller (R. 30); M. Miller (R. 85)). It also shows that taxpayer did not, however, forego the sale. On the following day, February 23, taxpayer's attorney and accountant met with its two stockholders, Louis and Minnie Miller, and their son Harry Miller; the three Millers held a special directors' meeting at which it was resolved to liquidate (R. 53–55) and at the conclusion of which Louis and Minnie Miller held a special stockholders' meeting to ratify this resolution (R. 55–57). On the same day a deed conveying taxpayer's property to Louis and Minnie Miller jointly was executed on taxpayer's behalf by Louis Miller as president (R. 58–60). The attorney for

the purchaser, who had meanwhile prepared the written contract naming taxpayer as vendor, was then notified of the change in title and requested to redraw the contract so as to substitute Louis and Minnie Miller individually as vendors; this he did on February 25 (R. 33). On the following day, February 26, the contract was executed by the Millers individually as vendors (R. 62–68), and the deed from taxpayer to the Millers was recorded the same day (R. 60). The contract recited the receipt by the Millers of a down payment of $1,000 (R. 62); this represented a credit against the purchase price of a previous rent payment by the Feiwishes to taxpayer (R. 85, 95–96). The sum of $2,000 which had been deposited by the Feiwishes with taxpayer as security under the lease was likewise applied against the purchase price by crediting that sum against the purchase money note and third mortgage given to the Millers (R. 70).

This evidence furnishes a solid foundation for the Tax Court's findings and for its conclusion that taxpayer did not abandon the oral agreement, but attempted rather to conceal its identity as the real vendor by resorting to a sham liquidation distribution. Indeed, the material facts are uncontroverted[2] and, as the dissenting opinion

[2] Taxpayer takes exception (Br. in Opposition, pp. 5–6) only to the finding (R. 90) that a $1,000 rent payment on January 5, 1940 was used as the $1,000 down payment against

below points out (R. 122), would appear to admit of no other inference. Without impugning the Tax Court's conclusion for lack of evidentiary support, the majority of the court below brushed it aside and bottomed its decision, in part at least, upon the contrary assumption that taxpayer "called off" the oral agreement and effected a bona fide liquidation distribution. In thus substituting its own view of the facts, the majority of the court below disregarded the repeated admonitions of this Court respecting the limitations on the scope of judicial review of Tax Court decisions, reiterated in *Dobson* v. *Commissioner, supra,* and again in *Commissioner* v. *Scottish American Investment Co., supra.*

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the purchase price which the sale contract recited (R. 62) as having been received by the Millers. This finding was fully explained by the Tax Court (R. 95–96), and taxpayer's motion for reconsideration of it was denied (R. 21–22). Moreover, it is clear from the Tax Court's opinion that this was but a cumulative factor entering into its determination, as was also the allied and undisputed finding (R. 91) that the $2,000 deposited with taxpayer as security under the lease was applied in reduction of the purchase money mortgage. In any event, even assuming that the entire purchase price was received by the Millers individually, that would no more be determinative of the substance of the transaction than the fact that they had substituted themselves individually as vendors.

II

THE COURT BELOW ERRED IN HOLDING THAT THE TAX COURT WAS PRECLUDED BY THE FORM OF THE TRANSACTION FROM FINDING THAT THE SALE WAS IN FACT MADE BY TAXPAYER

Insofar as the decision below is predicated on the fact that taxpayer did not execute a binding written agreement in its own name, it violates the principle, affirmed by this Court in a variety of contexts, that tax consequences flow from the substance of a transaction, not the form in which it is cast. *Gregory* v. *Helvering,* 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Griffiths* v. *Commissioner,* 308 U. S. 355; *Higgins* v. *Smith,* 308 U. S. 473; *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44; *Lucas* v. *Earl,* 281 U. S. 111; *United States* v. *Phellis,* 257 U. S. 156. In applying the maxim that the reach of the income tax law is not to be delimited by refinements of title, this Court has uniformly held that income may be realized despite an anticipatory arrangement which prevents its passage into the taxpayer's hands. *Harrison* v. *Schaffner,* 312 U. S. 579; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Helvering* v. *Clifford,* 309 U. S. 331; *Douglas* v. *Willcuts,* 296 U. S. 1; *Burnet* v. *Leininger,* 285 U. S. 136; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716.

To hold, as did the court below, that a corporation which has orally agreed to sell its assets and has received part of the purchase price may escape tax liability on the gain resulting from the sale by conveying title to the purchaser via its controlling stockholders, exalts artifice above reality. And to consider the "controlling" fact to be that the corporation refrained from legally binding itself by a written agreement[4] sanctions, we believe, the kind of formalism which this Court has consistently refused to recognize as effectual to alter tax liability.

No valid reason exists for regarding the instant transaction as immune from operation of the doctrine enunciated in the above cases, and none was suggested in the opinion below. It is not enough to point out, as did the court below (R. 120), that a taxpayer may minimize taxes by any lawful means. The boundaries of tax avoidance do not encompass resort to legal mechanisms having no legitimate business object and designed solely to disguise the substance of the challenged tax event. The crucial question which remains, and to which the majority of the court below failed to address

[4] The rationale of the decision below would apply with equal force in a situation where, after the corporation had executed a binding sale contract, it mutually agreed with the purchaser to rescind so as to render it "free" to make a liquidation distribution to its stockholders and substitute the stockholders as nominal vendors. The purchaser's agreement could be readily secured since acquisition of good title, not the identity of the vendor, is the purchaser's only concern.

itself, is whether the transaction under scrutiny is in fact what it appears to be in form.

The statute contemplates that if a corporation sells its property it is taxable on the resultant gain. Internal Revenue Code, Section 22 (a), *supra*, p. 2; Section 19.22 (a)–19 of Treasury Regulations 103, *supra*, pp. 2–3. On the other hand, a corporation may distribute its assets in kind, in complete or partial liquidation, without incurring tax liability, though the assets have appreciated in value since their acquisition. Section 19.22 (a)–21 of Treasury Regulations 103, *supra*, p. 3. In relieving the corporation of tax liability upon a distribution in liquidation of appreciated assets, the statute is patently aimed at a bona fide distribution; it was not intended to embrace a distribution which, though technically perfect and literally complying with the statute, is designed to cloak what is in reality a sale to a third party.

The record here unquestionably warrants the Tax Court's conclusion that what substantially occurred was a sale by taxpayer to a third party. For quite apart from taxpayer's admission that the sole purpose of the distribution in liquidation was tax avoidance, the conclusion is irresistible that the circuitous routing of the title to the purchaser via the stockholders was without reality or business substance. The corporate assets were not received by the stockholders to hold or use as their own, even temporarily, nor in proportion to

their stock holdings. The stockholders took title jointly, through a paper liquidation distribution, only to substitute themselves as vendors under the written contract embodying the self-same oral agreement they had negotiated and reached on behalf of their corporation. Amounts previously paid to the corporation as rent and as a security deposit under an outstanding lease of the property were credited against the purchase price, while the balance of the price was made payable to the stockholders. (R. 58–72, 88–91.) Not a single practical result was achieved by the stockholders' receiving transitory legal ownership and acting as conduit of the title which would not have been reached had the taxpayer simply and directly carried out its oral agreement, received the entire purchase price, and distributed the proceeds to its stockholders in liquidation.

In *Gregory* v. *Helvering*, 293 U. S. 465, the taxpayer's wholly owned corporation transferred securities to a new corporation, organized to avoid taxes, which issued all of its shares to the taxpayer, and which was subsequently dissolved and liquidated by the distribution of the securities to the taxpayer. It was held that although the transaction had the form of a corporate reorganization, it was without any business purpose and consequently the non-recognition provisions of the income tax law were inapplicable. This Court

examined the substance of the transaction and concluded that the newly organized corporation was nothing more than a contrivance (p. 469)—

> having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner.

To paraphrase the above language, the liquidation distribution here in question was a mere device which taxpayer sought to employ as a disguise for concealing a sale to a third party, and the sole object of which was the consummation of a preconceived plan not to distribute the assets to its stockholders but to transfer them to the purchaser.

The circumstance that the newly organized corporation in the *Gregory* case was not bound, in a formal legal sense, to distribute the securities to the taxpayer—the end sought to be achieved—did not prevent this Court from holding that the interposition of the new corporation was to be ignored. No more significant is the circumstance in this case that the taxpayer did not bind itself and its shareholders by executing a written contract.

The principle of the *Gregory* case was approved in *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609, 613–614. Both the reorganization provisions involved in the *Gregory* case and the liquidation-in-kind provisions here involved are aimed at relief from taxation. In both instances no gain or loss is recognized. In neither case, we submit, does a ritualistic compliance with the literal terms of the relief provisions suffice to give the taxpayer hoped-for advantages that were plainly intended for others. To grant the relief in this case would pervert the purpose of the liquidation-in-kind provisions in the same manner that the taxpayer unsuccessfully sought in the *Gregory* case to misuse the reorganization provisions.

In *Higgins* v. *Smith,* 308 U. S. 473, and *Griffiths* v. *Commissioner,* 308 U. S. 355, this Court refused to permit controlling stockholders to use the corporate entity to avoid individual taxes. Although this case presents, conversely, the tax liability of the controlled corporation, the broad principles underlying the decisions in those cases are applicable here. The attendant tax disadvantages of electing to do business as a corporation, which this Court, in the *Smith case* (p. 477), indicated must be accepted by the stockholders, include the tax burdens falling upon their controlled corporation. Cf. *Moline Properties* v. *Commissioner,* 319 U. S. 436; *Burnet* v. *Commonwealth Imp. Co.,* 287 U. S. 415.

In *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44, this Court held that the umbilical cord

between a corporation and its stockholders is not severed merely because the corporation transfers its property under a contract which vests all rights thereunder directly in the stockholders; though the corporation has removed itself as conduit of the proceeds, the right of the stockholders remains derivative. This Court stated (p. 48):

> Payments made directly to shareholders by the lessee or transferee of corporate property are properly recognized as income to the corporation by reason of the relationship of a corporation to its shareholders. The fact that there is an anticipatory arrangement whereby the taxpayer is not even a conduit of the payments is no more significant in this type of case than it was in *Lucas* v. *Earl, supra.*

The anticipatory arrangement condemned in the *Joliet* case is little different, in substance and from the tax viewpoint, from that employed here. That taxpayer here invoked a "straw" distribution in liquidation as part of the arrangement can hardly suffice to insulate it from ownership of the purchase price which the purchaser paid directly to the stockholders. Cf. *Forest Glen Creamery Co.* v. *Commissioner,* 123 F. 2d 522 (C. C. A. 7th); *Sarther Grocery Co.* v. *Commissioner,* 63 F. 2d 68 (C. C. A. 7th).

In *General Utilities Co.* v. *Helvering,* 296 U. S. 200, the taxpayer corporation distributed shares of stock of another corporation as a dividend to its stockholders, who thereafter sold the shares to

a third party. The only issue litigated before the Board of Tax Appeals, on stipulated facts, was whether the shares were distributed as a dividend in kind or in satisfaction of a cash dividend. The Board concluded that it was the former and that therefore taxpayer realized no gain on the distribution. On appeal the Circuit Court of Appeals for the Fourth Circuit sustained the Board's determination of that issue, but proceeded to hold that the subsequent sale of the shares by the stockholders was in reality a sale by the corporation the gain from which was attributable to it (74 F. 2d 972). This Court reversed on the procedural ground that the question of the liability of the corporation as the real vendor had not been raised before or passed upon by the Board. Mr. Justice McReynolds, delivering the opinion of the Court, stated (pp. 206–207):

> Here the court undertook to decide a question not properly raised. Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause.

We are here confronted with no such procedural problem. In the *General Utilities* case the collateral question whether the corporation was

the real vendor was not litigated before the Board but the Circuit Court of Appeals attempted to determine it and, moreover, determined it "directly in conflict with the stipulation of the parties and the findings." Here, on the other hand, that question was the primary issue before the Tax Court, the Circuit Court of Appeals had the benefit of the Tax Court's findings on the issue, and the findings are unquestionably supported by the record. Whether or not in the *General Utilities* case the Circuit Court of Appeals' attempt to determine the issue *de novo* was warranted and whether or not a remand of the case to the Board would have been futile in the light of the facts there stipulated is of academic importance here, for the instant case presents the converse situation where the Circuit Court of Appeals has disregarded the Tax Court's conclusive determination of that factual issue. Cf. *Commissioner* v. *Scottish-American Investment Co., supra; Dobson* v. *Commissioner, supra.*

The lower federal courts have held consistently that where controlling stockholders of a corporation who have negotiated for the sale of corporate assets cause the corporation to transfer the assets to themselves (either by way of a "liquidation distribution" or a "sale"), and then consummate the sale individually, corporate tax liability is not foreclosed by the form of the transaction but the court will look to its substance

to determine whether the sale was in reality that of the corporation. *Meurer Steel Barrel Co.* v. *Commissioner,* 144 F. 2d 282 (C. C. A. 3d), petition for certiorari filed October 20, 1944 (No. 614); *Embry Realty Co.* v. *Glenn,* 116 F. 2d 682 (C. C. A. 6th); *S. A. MacQueen Co.* v. *Commissioner,* 67 F. 2d 857 (C. C. A. 3d); *Trafford Oil & Gas Co.* v. *Commissioner,* 78 F. 2d 814 (C. C. A. 3d), certiorari denied, 296 U. S. 630; *Liberty Service Corp.* v. *Commissioner,* 77 F. 2d 94 (C. C. A. 3d); *Nace Realty Co.* v. *Commissioner,* 28 B. T. A. 467, affirmed *per curiam* April 13, 1935 (C. C. A. 6th); *Boggs-Burnam & Co.* v. *Commissioner,* 26 B. T. A. 988, affirmed *per curiam* 71 F. 2d 999 (C. C. A. 6th). Cf. *Chisholm* v. *Commissioner,* 79 F. 2d 14 (C. C. A. 2d). Thus, in the recent case of *Meurer Steel Barrel Co.* v. *Commissioner, supra,* it was held that despite an elaborate liquidation plan whereby a corporation had transferred its assets to a partnership composed of some of its stockholders, a later sale by the partnership was in substance a sale by the corporation the gain from which was attributable to it. The Court distinguished the *Chisholm case, supra,* which also involved the transfer of corporate assets to a partnership that later sold them because the partnership there formed was a bona fide and continuing one, not a transitory device employed to escape tax. In *Embry Realty Co.* v. *Glenn, supra,* a corporation which had been

negotiating for the sale of some of its realty transferred the property in partial liquidation to its stockholders, who thereafter granted the prospective purchaser an option which culminated in a sale; it was held that though in form the transaction was a liquidation distribution and a sale by the stockholders, in substance it was a sale by the corporation. In *S. A. MacQueen Co.* v. *Commissioner, supra,* a corporation which made a sale to its president who later resold the property was held to be the real seller to the third party and taxable on the resultant gain.

It has also been uniformly held that where a corporation, in the course of liquidation, transfers its property to a trustee or agent for its stockholders, who thereafter sells the property, the sale is attributable to the corporation. *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6th); *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327 (C. C. A. 4th); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C. C. A. 8th), certiorari denied, 291 U. S. 684; *First Nat. Bank of Greeley, Colo.* v. *United States,* 86 F. 2d 938 (C. C. A. 10th); *Burnet* v. *Lexington Ice & Coal Co.,* 62 F. 2d 906 (C. C. A. 4th). See also *Steinberger* v. *United States,* 81 F. 2d 1008 (C. C. A. 9th). The same result is required by Section 19.22 (a)–21 of Treasury Regulations 103, which provides that sales made by trustees in dissolution "are to be treated as if made by

the corporation for the purpose of ascertaining the gain or loss". The Florida law, under which taxpayer was organized, provides that a corporation shall continue in existence for three years after dissolution for the purpose of paying its debts and winding up its affairs, and that its directors shall act as trustees in dissolution. Laws of Florida, 1925, c. 10096, Secs. 45–50; Florida Statutes (1941), Secs. 612.47–612.52. The corporate property is affected with a trust for the benefit of creditors, whose claims survive dissolution. *Howe* v. *Robinson,* 20 Fla. 352. The record does not disclose whether taxpayer had satisfied all debts before making the so-called liquidation distribution; but since taxpayer had the burden of proving the Commissioner's determination to be incorrect (*Welch* v. *Helvering,* 290 U. S. 111, 115), in the absence of proof to that effect we submit that its two stockholders must in any event be deemed to have acted as trustees in dissolution, not on their own behalf, in transferring the corporate assets to the purchaser and receiving part of the purchase price. This conclusion is also consonant with the familiar equity principle that dominant stockholders by virtue of their fiduciary relationship to the creditors of the corporation, may not deal with the corporate assets as their own. Cf. *Pepper* v. *Litton,* 308 U. S. 295, 306–307; *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44, 48–49.

The reasons given by the court below for reversing the Tax Court's decision here appear to be wholly inconsistent with those upon which it relied in affirming that tribunal's decisions in *Commissioner* v. *Falcon Co.*, 127 F. 2d 277; *Trippett* v. *Commissioner,* 118 F. 2d 764, certiorari denied, 314 U. S. 644; and *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. 2d 108, certiorari denied, 283 U. S. 862. In the *Falcon* case, which also involved a post-liquidation sale by stockholders, it pointed out (p. 278) that the record disclosed "no * * * use of mere form to hide the substance of the real transaction", that the taxpayer corporation had "definitely decided not to sell", that "there was no sale contract in existence" when the property was distributed to the stockholders, that the liquidation distribution was "bona fide", that the stockholders thereafter entered into an "independent contract" of sale, and that the corporation received no benefit of any kind from the transaction. It accordingly held that "under the circumstance shown we agree with the Board" that the sale "was in truth and in fact" a sale by the stockholders. We submit that the very considerations which impelled the court below to sustain the Tax Court's determination in that case required affirmance of the Tax Court's opposite conclusion in this case. In the *Trippett* case, the court below, relying heavily upon *S. A. MacQueen Co.* v. *Commissioner, supra,* sustained the

Tax Court's determination that a sale by a corporation's two stockholders after a purported liquidation distribution of the property was attributable to the corporation; the rationale of its decision is that the stockholders could act only as agents in disposing of the corporate assets. And in the *Taylor* case, where a corporation, in order to avoid tax on a prospective sale, transferred the property to its directors as liquidating trustees, who thereafter made the sale, the court below sustained the Tax Court's determination that the gain was attributable to the corporation and aptly observed (p. 109) that "The real owner was still the company".

Whether a liquidation distribution is genuine, or merely a sham designed to conceal what is in reality a sale by the corporation to a third party, is essentially a question of fact in each case. That the question should be so regarded and dealt with has not hitherto been challenged. The decision below would remove a traditional field of fact-finding and inference-making from the province of the Tax Court by requiring it, as a matter of law, to give effect to the form rather than the substance of a transaction. It is broad enough to apply to both complete and partial liquidations, and affords a ready means of tax avoidance, particularly by family corporations. It is also an invitation to controlling stockholders who have reached an agreement to sell (or otherwise dis-

pose of) corporate assets to cause the corporation to make a last moment paper "liquidation distribution" of the property to themselves and to consummate the sale individually, for the single avowed purpose of escaping the corporate tax.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

No. 581.

COMMISSIONER OF INTERNAL REVENUE,

v.

COURT HOLDING COMPANY.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF BY THE COURT HOLDING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED BY COMMISSIONER OF INTERNAL REVENUE.

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Attorney for Respondent On Review.

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OPINIONS BELOW.

The Opinion of the Tax Court of the United States (R. 86-102) is reported in 2 T. C. 531. The Opinion of the Circuit Court of Appeals (R. 117-122) is reported in 143 F 2d. 823.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on July 11, 1944 (R. 123). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the gain derived from the sale of the assets received by the shareholders of the Court Holding Company, a Corporation, after the shareholders had received such property in complete liquidation of the Corporation, was taxable to them as individuals or taxable to the Corporation.

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

> Sec. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 22).

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> Sec. 19.22 (a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over

all the assets and asumes the liabilities, the amount so assumed is part of the selling price.

* * * * * * * * * *

Sec. 19.22 (a)-21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 19.44-5. (See further section 19.52-2.)

STATEMENT.

The facts as found by the Tax Court are fully stated in the decision of that Court reported in 2 TC 531. Summarizing, the facts are that the taxpayer corporation was organized under the laws of Florida for the purpose of taking title to certain real estate known as the Mayfield Court Apartments. The corporation was a mere holding company and its only asset was the Mayfield Court Apartments. Its only business was the leasing of the building, consisting of a single lease transaction. Of the 50 shares of capital stock outstanding, 48 were owned by Minnie Miller and two shares by her husband, Louis Miller. Louis Miller was president of the corporation. Harry Miller, a son, was secretary. The rental was due $2,000 October 1, $1,000 December 15, $1,500 January 15, $2,000 February 1, $2,000 February 20 for each year. There was an initial deposit also in the amount of $2,000 to secure the general performance of the lease. During February of 1940 one M. W. Fine began negotiations with Louis Miller, president of the corporation, for the purchase of the building. The purchase

price had been orally agreed to between these two individuals. No contract had been entered into. On February 23, 1940, the prospective purchaser was notified that the corporation could not and would not make the sale for the reason that very large income taxes would result. On the afternoon of February 23, 1940 the three directors of the corporation met with their accountant and in a formal directors meeting resolved that the corporation should declare a dividend payable in the assets of the corporation in complete liquidation and surrender of all the outstanding corporate stock. A resolution was then passed declaring the dividend "payable in all the assets of the corporation (describing the building and its contents) subject to a first mortgage * * * and a second mortgage * * * and further subject to the lease between the corporation and Aaron and Regina Feiwish * * * in complete liquidation and surrender of all the corporate stock of the corporation held by Louis and Minnie Miller." The formal stockholders meeting was then held at which the resolution of the directors was ratified and confirmed; Louis Miller and Minnie Miller both signing the minutes. Thereupon the same afternoon the corporation executed its deed to the property to Louis Miller and Minnie Miller is accordance with the directors minutes. This deed was duly recorded. On February 26, 1940 the attorney for the prospective purchaser drew a contract providing for the same purchase price and conditions that had been agreed upon on February 20 by the president with certain minor changes. The contract acknowledged the receipt of a deposit of $1,000 and provided that if the title was approved other payments were to be made and credit allowed for $2,000 which amount had been held on deposit to secure the lease. The Tax Court found as a fact that the $1,000 paid, the receipt of which was acknowledged in the contract, was the application of a check for $1,000 dated January 5 by Aaron Feiwish to the Millers. Title was transferred by the Millers to Mrs. Fine on April 1, 1940. The corporation has owned no property since the transfer of its assets, and has done no business.

ARGUMENT.

The petitioner on review sets forth in his petition that the Circuit Court reached its decision reversing the Tax Court upon two (incompatible controlling) factors. (Br. 8), namely, (1) that the taxpayer "called off" the oral agreement, and (2) that the taxpayer did not legally bind itself in writing and accordingly was free to declare that it would not "go forward with the sale" in its own name but would pass title to the stockholders in the form of a liquidation distribution, for the sole purpose of enabling them to go forward upon the "same terms" in their own names.

The respondent agrees with the petitioner on review that it is the function of the Tax Court and not the Circuit Court of Appeals on review to weigh the evidence and find the facts, (*Dobson* v. *Commissioner* 320 U. S. 489) The respondent further agrees that the Circuit Court on review may not substitute its own views of fact different from those found by the Tax Court when the findings of the Tax Court are based upon some evidence in the record. The case of *Dobson* v. *Commissioner, Supra,* did not, however, go so far as to hold that the Tax Court could make findings which were not based upon evidence or could make findings contrary to the evidence and that such findings would be binding upon Circuit Court of Appeals on review. This Court has never gone so far. The findings of a Tax Court to be effective must not be contrary to the evidence and must be supported by the evidence. In the instant case the Tax Court held that the $1,000 paid on January 5, 1940 was the deposit of $1,000 referred to in the contract, the receipt of which is acknowledged in the contract of February 26, 1940. In this respect the finding of the Tax Court is contrary to the evidence in the case and there is no evidence to support the findings of the Tax Court. This is demonstrated by the fact that the negotiations for the sale of the property had not started by the president of the corporation and proposed purchaser until February 20, 1940.

And the evidence further shows that the $1,000 paid on January 5, 1940 was rental. There is no evidence to the contrary and the finding of the Board that this $1,000 was paid as a deposit on the purchase price is contrary to all the evidence.

In the Brief in behalf of the Commissioner filed in this Court, great reliance is placed on the above finding of fact by the Tax Court. This is one of the pillars upon which the Tax Court based its opinion.

It is not even claimed by the Petitioner on review that a binding contract was ever entered into for the sale of the property by the corporation. The most that is claimed is that an oral contract was entered into in behalf of the corporation which was never made a binding agreement. Instead of making it a binding agreement the corporation, through its proper officers, decided not to sell the property and it is not claimed that the corporation actually made the sale. The Tax Court held that the individual stockholders agreed and bound themselves as individuals to perform the so-called oral agreement of the president of the corporation, which the corporation itself by proper action had declined to make and bind the corporation. Admittedly the sale was made by the stockholders themselves as individuals. Were they in any way obligated to carry out the oral agreement in behalf of the corporation? Or were they acting in behalf of the corporation in making this sale? If these two questions are answered in the negative then there is no basis for reversing the decision of the Court below. On these two questions there is no conflict in the evidence. The evidence is undisputed. Yet the Tax Court made its findings contrary to this undisputed evidence.

The corporation itself clearly was not legally bound by any oral agreement under the Florida law. The decision of the Circuit Court of Appeals only states the long established law of the State. The corporation deliberately declined to enter into a binding agreement to sell or to make a sale. How then could it be said that the stockholders were later so obligated. The stockholders received the property

in complete liquidation of the corporation and after its receipt made their own contract and made their own sale, received the consideration therefor and included the profits in their individual income tax returns.

When the Tax Court found that the stockholders carried out the agreement made by the corporation and not an agreement made by themselves it committed an error of law in that such findings are not supported by the evidence. They are only conclusions not based on facts or evidence. The statement by the Tax Court that it "was always intended and understood by the parties (stockholders and purchaser) that the sale would be made exactly as agreed by the oral agreement of the president of the corporation except for change in identity of the vendor" is only an assumption. The fact is that the stockholders received the assets with no binding agreement by the president. The president himself was only the owner of two shares of the stock. There is no evidence whatever in this record as to what the stockholders themselves intended to do with the assets when they received them in liquidation. It was their own decision which they carried out as individuals. There is not a word of evidence that the stockholders were acting as agents for the corporation when they made the sale of the property. The statement in the Brief of the petitioner on review that the Lower Court (the Court of Appeals) assumed that the corporation was "actually" liquidated, was the substitution of the Court's view for that of the Tax Court, is not warranted as the record clearly discloses that the corporation was in fact liquidated and there is not any evidence of any character to the contrary. When the Circuit Court of Appeals therefore stated that the corporation was actually liquidated it was only following the undisputed facts and the undisputed evidence in the record notwithstanding the assumptions made by the Tax Court to the contrary. The statement by the Tax Court that the liquidation was not bona fide but "were formal devices to which resort was had only in the attempt to make the transaction

appear to be other than what it was" is only an assumption or surmise by the Tax Court and is not a fact established by evidence in the case. At most such statements are only opinions of the Tax Court as distinguished from facts. Such opinions, assumptions or surmises are not binding upon the Circuit Court of Appeals on review unless established by evidence. The Court on review had the right to determine the basis for such opinion and inquire as to whether the facts and the evidence supported it. This is not in any way in conflict with opinion of this Court in *Dobson* v. *Commissioner*, 320 U. S. 489.

In finding that the oral agreement was "called off" the Court below (Circuit Court of Appeals) was only acting on undisputed evidence in the case.

It is stated in the Brief of petitioner on review that if a corporation sells its property it is taxable on the resultant gain. The statute so provides. It is equally true, however, that if the corporation does not sell its property it is not liable for taxes as if it had sold it.

It is contended that the liquidation of the corporation in this case was a mere sham, resorted to in order to avoid taxes. None of the cases relied on in the Brief of petitioner on review are actually in point and are clearly distinguishable from the facts in this case. The statements made by the Tax Court in this regard are only arguments and not facts and the Court of Appeals on review had the statutory jurisdiction and duty to review the Tax Court decision on questions of law. It is equally clear that findings of fact or opinions of the Tax Court not based on evidence or contrary to the evidence constitutes error of law which the Court on review had the right and duty to correct. This is what the Court below has done. The Tax Court's surmises and arguments are not findings of fact nor are the Court's opinions or conclusions without the factual foundation.

It is submitted that there is no question of law of general interest to warrant this Court granting the Writ. It is in

fact only the correct application of law to the facts. The law is clear. Only the facts are involved. This does not constitute such a case of law of general interest as to warrant the granting of Certiorari by this Court.

In view of the foregoing it is apparent that there is in fact no conflict of decisions of the lower Court on questions of law involved. It is only correct application of the facts of the law and the real question is whether the decision of the Tax Court was supported by the evidence or is in accord with the evidence and not contrary thereto.

This is the basis upon which the Circuit Court of Appeals entertained jurisdiction and corrected the errors of law made by the Tax Court.

CONCLUSION.

It is respectfully submitted that this petition for Writ of Certiorari should be denied.

MAURICE KAY,
Attorney for Respondent On Review.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 581.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

COURT HOLDING COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW.

The opinion of the Tax Court (R. 86-102) is reported in 2 T. C. 531. The opinion of the Circuit Court of Appeals (R. 117-122) is reported in 143 F. 2d 823.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 11, 1944 (R. 123.) The petition for a writ of certiorari was filed on October 11, 1944, and was granted

on November 20, 1944 (R. 124). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Tax Court committed reversible error in holding that a sale made by the corporate taxpayer's two shareholders, of property received in the liquidation was, in substance, a sale by the taxpayer, the gain from which was attributable to it.

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code:

Sec. 22. Gross Income.

(a) *General definition.* "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 22).

Section 1141 (a) The Circuit Court of Appeals and the United States Court of Appeals for the the District of Columbia have exclusive jurisdiction to review the decisions of the Board, except as provided in Section 239 of the Judicial Code, as amended, 43 Stat. 938, (U. S. C. Title 28 § 346); and the judgment of any such court shall be final, except it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C. Title 28 § 347)

Sec. 1141 (c) "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse

the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)-19. *Sale of capital assets by corporation.* If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

* * * * * * * * *

Sec. 19.22 (a)-21. *Gross income of corporation in liquidation.* When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19-52-2.)

STATEMENT.

The facts as found by the Tax Court (R. 87-83) may be summarized as follows:

Taxpayer, a Florida corporation, was organized in 1934 to acquire title, at a foreclosure sale, to an apartment building in Miami Beach. This was its only asset. Of its fifty shares outstanding, forty-eight were owned by Minnie Miller and the other two by her husband, Louis Miller. In 1938 taxpayer leased the building to Aaron

and Regina Feiwish for three years commencing October 1, 1938. Some time after October 1, 1939, the Feiwishes, together with a sister and brother-in-law of Mrs. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. In February, 1940, Louis Miller, acting as president of taxpayer, agreed to sell and the Fines agreed to purchase the property for $54,500. The terms of sale were agreed upon, and on February 22, 1940, the parties and their attorneys met for the purpose of having the oral agreement reduced to writing and executed. The attorney for the Fines prepared a contract embodying the terms of the oral agreement, but the writing was never executed by the corporation. At the meeting of February 22, taxpayer's attorney advised the purchased that taxpayer could not consummate the sale, for the reason that it would result in the imposition of a large income tax. (R. 87-88.)

On February 23, 1940, taxpayer's attorney and accountant met with Minnie and Louis Miller, and Harry Miller, their son (R. 84). The three Millers, constituting all of the taxpayer's directors, then held a special meeting at which it was resolved that "it would be in the best interest of the corporation to have it declare a dividend payable in the assets of the corporation, in complete liquidation and surrender of all the outstanding corporate stock." Immediately thereafter, Louis and Minnie Miller, as stockholders, held a special meeting and adopted a resolution ratifying the action of the directors. On the same afternoon, subsequent to adoption of these resolutions, a deed conveying taxpayer's property to Louis and Minnie Miller jointly was executed on taxpayer's behalf by Louis Miller as president, and attested by Harry Miller as secretary. Thereafter, the attorney for the purchaser was notified of the change in title and was requested to prepare a new contract naming the Millers individually as vendors. The contract was drawn, providing for the same purchase price and embodying the same terms and conditions as had been

previously agreed upon at the meeting of February 22, except for a correction in the amount stated to be the unpaid balance of an existing mortgage to which the sale was subject. It was executed by the Millers as vendors and by Margaret W. Fine as purchaser on February 26, 1940. The deed from taxpayer to the Millers was recorded the same day. (R. 89-90.)

The contract between the Millers and Mrs. Fine recited the receipt of a down payment of $1,000; this represented a credit against the purchase price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940. The balance of the purchase price, amounting to $53,500, was payable in the amount of $12,500 in cash upon closing, by the assumption of an existing first and second mortgage, and the execution of a purchase money note and third mortgage. Two thousand dollars which had been deposited with taxpayer by the Feiwishes as security for performance of the lease was applied in reduction of the purchase money note and third mortgage. Taxpayer has transacted no business nor owned any property since the liquidation distribution, but has not been formally dissolved. (R. 90-91.)

In its 1940 return, taxpayer reported no gain as having been realized from the sale. In her individual return for 1940, Minnie Miller reported a long-term capital gain on the exchange of her stock for taxpayer's assets, of which fifty percent was taken into account. The Commissioner determined that taxpayer realized a taxable gain on the sale and computed a deficiency accordingly (R. 91-93). The Tax Court affirmed his determination (R. 93-101). The Circuit Court of Appeals reversed, one judge dissenting (R. 117-122).

While the foregoing statement of facts were the facts as found by the Tax Court, the following facts as found have no substantial basis in the record:

1. That the $1,000.00 recited as "down-payment" in the contract for the sale by the Miller's with Margaret W. Fine

dated February 26, 1940, "represented a credit against the purchase price of a rent payment in that amount made by the Feiwishes to taxpayer on January 5, 1940."

2. That sometime after October 1, 1939, the Feiwishes together with a sister and brother-in-law of Mrs. Feiwish, the Fines, began negotiations with Minnie Miller for the purchase of taxpayer's property. The record discloses that the negotiations began on February 20, 1940, (see Record 24). The only evidence to the contrary is the general statement prepared by the Revenue Agent for Minnie Miller's signature and signed by her. This statement is discussed below.

3. The Circuit Court of Appeals, having considered the entire record, reversed the Tax Court on the basis that its inferences and conclusions drawn from the facts found, were not supported by the evidence and were contrary to law.

TAXPAYER'S CONTENTION.

1. That under the statutes the Circuit Court of Appeals had the right and duty to hear the appeal.

2. That it had the right as well as the duty to reverse the decision of the Tax Court.

3. That the Findings of Fact made by the Tax Court do not warrant and are not a substantial basis for its inferences and conclusions drawn from them as properly decided by the Court below on appeal.

4. That certain findings of fact found by the Tax Court have no substantial basis in the evidence and are inconsistent with the evidence.

5. That certain findings of fact as set out by the Tax Court are based entirely on an ex parte statement of Minnie Miller when the Tax Court itself pointed out that the statement was not true.

6. Certain inferences drawn by the Tax Court are inconsistent with facts found by it.

7. There is no substantial basis in the record for the inferences drawn by the Tax Court.

8. The decision is contrary to the law as applicable to the facts found by the Tax Court and contrary to the law as applicable to the facts which do have substantial basis in the record.

SUMMARY OF ARGUMENT.

The so-called findings of the Tax Court on which its decision was based were in fact inferences or conclusions based on evidentiary facts which were not established by substantial evidence. Thus, they constitute errors of law and the Circuit Court of Appeals had the right and duty to reverse or modify the decision and to draw its own conclusions from established facts or the evidence. The Tax Court concluded that the taxpayer had entered into an oral contract to sell its property, received a part payment of the agreed price, and at the last moment in order to avoid taxes, distributed the property to its stockholders, who promptly thereupon bound themselves in writing to perform individually the act which they had heretofore agreed to perform as a corporation.

The conclusion that the taxpayer had entered into an oral agreement to sell its property is contrary to the facts. Under the law there can be no oral contract for the sale of real property in Florida. In the second place all the evidence indicates that it was the intention of the parties that they were to be bound only by a contract in writing and thus no contract was entered in. But conceding for the sake of argument that there was an oral agreement, it and all negotiations were definitely called and ended before the corporation was liquidated. There is no evidence to the contrary.

There is no controversy over the facts found by the Tax Court in its "Findings of Fact"—except the conclusion found as a fact that the $1,000.00 referred to as being paid on January 5 was applied as a part of the purchase price, and the failure to find that the negotiations for the sale began February 20, 1940, as shown by the evidence. As to that so-called fact that the $1,000.00 paid on January 5, 1940, was applied on the purchase price, there is no substantial evidence to support it—there is no evidence to substantiate the conclusion that the liquidation was a sham and there is no substantial evidence to establish the conclusion that the taxpayer made the sale here involved. In the absence of substantial evidence to support the inferences and conclusions from the evidence the Circuit Court of Appeals properly reversed the Tax Court and properly substituted its own findings based on the record.

ARGUMENT.

The regulations (see 19.22 (a)-21) promulgated by the Commissioner of Internal Revenue approved by the Secretary provide:

> "No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."

This regulation has been in effect under all the Revenue Laws since the 1918 Revenue Act. It is therefore deemed to have received Congressional approval. This regulation has never been construed that it would not be effective if the Corporation had a purpose of tax saving by the liquidation and distribution of property to its stockholders,—that it would not be applicable if the Corporation or its stockholders received thereby any tax benefits.

In the case at bar there is no controversy over the fact that the Corporation was liquidated and the assets distributed to the stockholders. Admittedly the property was

legally distributed to the stockholders and admittedly the stockholders actually sold the property, made conveyance thereof in legal form and received the consideration therefor, except for the erroneous conclusion that $1,000 paid as rent to the corporation was applied on the purchase price.

But the Tax Court concluded and decided that notwithstanding the foregoing facts the sale was made by the Corporation—and not by the stockholders—this conclusion and decision was based on two evidentiary conclusions, namely that an oral agreement had been made by the Corporation to sell and that the corporation had received a part of the purchase price. It is submitted that neither of these conclusions or inferences is warranted by the evidence or has any substantial basis in the evidence.

These two conclusions or inferences will be discussed in their inverse order, and the question whether the Corporation received any part of the purchase price will be discussed first,—that involves the amount of $1,000 paid on January 5, 1940. The only evidence to support the conclusion or finding that this was applied on the purchase price is the affidavit of Minnie Miller. That statement was prepared by a revenue agent who refused to permit her to have counsel or any other person present. She made the general statement that all amounts paid as rent by the Fines or Feiwishes subsequent to October 1, 1939 were applied on the purchase price. There is no evidence, however, that said $1,000.00 paid to Louis Miller was paid as rent by the Fines or Feiwishes subsequent to October 1, 1939 were applied on the purchase price. The Tax Court in discussing this statement of Minnie Miller stated that it could not be correct and stated: (Rec. 95) "Thus payments made during 1939 could not have been on account of the purchase price," but stated if those amounts be eliminated from consideration it is apparent that the statement cannot be entirely correct. The Tax Court infers however that the $1,000 was paid on the purchase price at some time

prior to February 26, 1940 and that the only payment of that amount shown to have been made subsequent to January 1 was the $1,000 paid on January 5, The Tax Court relied only on the general statement of Minnie Miller from Exhibit E before the Tax Court that amount was paid to Louis Miller. There is not a word of evidence other than the statement of Minnie Miller, which the Tax Court stated was not correct, to the effect that it was applied on the purchase price. There is in fact no evidence that the Corporation received the amount.

The finding that it was so paid is contrary to all the direct and positive evidence in the case. The contract for deed Exhibit #5 recites a cash consideration of $1,000 received from Margaret W. Fine. (It is to be noted that the $1,000 disbursed on January 5, 1940 was disbursed by Aaron Feiwish) and was received by Louis Miller. See Exhibit E.

In the Petitioner's Exhibit 5, the memorandum agreement and deposit receipt it is further recited in paragraph 3 thereof that the deposit then acknowledged was to apply on the purchase price. The total consideration recited was $54,500 of which the said $1,000 was a part.

In the closing agreement dated April 1, 1940 reference is made to the $1,000 as cash "heretofore paid."

There can be no serious doubt that there is nothing in the record to show that there were any negotiations for the sale of the property prior to February 1940. The question then is how could a payment made on January 5, 1940 could then have been considered as being applied on the purchase price.

The recitation of consideration in the contract of sale which was carried into execution of the receipt of the $1,000 is presumed to be true unless substantial evidence is introduced to show the contrary. This is the contract between the Millers and the purchaser, after the liquidation.

The Contract of Sale by the Millers further recites that the $1,000 deposited as part of the purchase price, would be "returned" to the purchaser if the sale were not consumated on account of insufficiency of title.

This would mean that the Millers would "return" an amount never received by them, if it be held that the $1,000 paid January 5 were to be applied on the purchase price. This would mean that if the sale were not consumated, and even if it be construed that the taxpayer Corporation received the said $1,000 that it would forego rent to that extent. There is no evidence that it was intended to permit any free occupancy or forego collecting rent. Louis Miller testified that this $1,000 represented money borrowed on June 13, 1939 which was paid by crediting it against rent due in January. The Tax Court in its "Findings of Fact" (page 88 Record) states as follows: "The $500 note and the $1,000 were similarly applied in December 1939 and January 1940 respectively. The $350 cash bonus was subsequently entered upon petitioner's books as rent discount and deduction was claimed therefor on its 1939 return."

If the disbursement of $1,000 on January 5, 1940 from Aaron Feiwish to Louis Miller was another payment different and distinct from the $1,000 credited in January 1940 as found by the Tax Court, there is not a word of evidence in the record that it was received by or in behalf of the Corporation and no word of evidence of any character that it was applied on the purchase price, because the only evidence that such amount was received as part of the purchase price is the ex parte statement by Minnie Miller before the Revenue Agent, that all payments received by the Corporation "as rent" was applied on the purchase price. The Tax Court did not believe this statement, and pointed out why it could not be true, yet accepted the statement insofar as it related to the $1,000 represented by "disbursement" of Aaron Feiwish on January 5, 1940. If the $1,000 loan was paid in January 1940 as correctly

found by the Tax Court based on evidence is added to another $1,000 represented by a cash payment of that amount, it would make $2,000 paid in January 1940. Yet the record shows that only $1,000 was received in January 1940 by the Corporation. This was at a time when no negotiations had been entered into for the sale of the property by or in behalf of the Corporation. It would mean that the Corporation received $1,000 more than the regular rent as provided in the lease, and it would indicate the Tax Court did not base its finding even on the statement of Minnie Miller because she stated that "all amounts paid as rent" subsequent to October 1939 were applied on the purchase price. There is no evidence of any kind in the record to support the finding of the Tax Court that $1,000 was applied on purchase price paid to the Corporation. There was no reason disclosed by the record for the payment of excess rent and neither of the parties contemplated a sale or purchase at that time. From all that is disclosed by the record, if the January 5, 1940 payment is a separate and distinct matter not connected with the credit for that amount on rent on account of borrowed money, it was a personal matter between Louis Miller and Aaron Feiwish. There is nothing to show that the Corporation had anything to do with it.

In view of the foregoing the taxpayer respectfully submits that there is no substantial evidence in the record to support the finding by the Tax Court with respect to this $1,000 and the substantial and convincing evidence is to the contrary.

It is to be observed that the statements of disbursements of Aaron Feiwish so heavily relied on is all the disbursements of Feiwish and not merely those relating to rents or payments for the benefit of the taxpayer corporation. According to this statement Feiwish disbursed $10,225 in 1939 and $5,025 in 1940 It is not even contended that the Corporation received all these disbursements.

The next conclusion or inference on which the Tax Court based its decision is that there was an oral agreement made by Miller in behalf of the Corporation taxpayer to sell the property and that on account of the high tax which would result, the Corporation adopted and devised a plan to go through the form of liquidation and actually carry out that agreement, through the instrumentality of its stockholders.

This point was answered by the Circuit Court of Appeals in the opinion of the taxpayer correctly. This involves a question of law as well as a question of fact. In the first place under the law of the State where the contract was alleged to have been made there can be no contract to sell real property unless it is in writing. (Comp. Gen. Laws of Florida 1927 Vol. 3, Sec. 5779). The Supreme Court of Florida has held that even a part payment of the purchase based on an oral agreement to sell real property is not sufficient to give validity to the oral agreement. *Williams* v. *Bailey* (67 So. 887) and other cases. But the Tax Court holds that the above statements and decisions are not effective or applicable since the oral agreement was carried out and performed. It is respectfully submitted that there is not a word of testimony either substantial or unsubstantial in the record to show that the so-called oral agreement was carried out by the Corporation. The undisputed facts are that the so-called oral agreement was called off, the Corporation liquidated and the property actually sold by the stockholders. Certainly the Corporation did not execute the deed. In order that the rule of law applied by the Tax Court, that is that the oral contract was fully executed, there must be some evidence that the Corporation itself made the sale. Admittedly the stockholders made and executed the deed, and admittedly the title was in their name when they executed it and received the purchase price. The real question is whether the stockholders were acting as agents for the Corporation in making the sale. This depends upon the question whether the Corporation had con-

tracted to sell before the liquidation. Obviously the so-called oral agreement was not an effective agreement. Neither the purchaser nor the seller intended to be bound by an oral agreement. From the conduct of the parties it was obviously intended that their agreement was to be in writing. The Flordia law required such an agreement to be in writing and the conduct of all the parties clearly shows that they intended any agreement to be in writing to be effective. (See also Comp. Gen. Laws of Florida 1927 Sec. 5779) and *Tate* v. *Jones*, 16 Fla. 217; *William* v. *Bailey*, 69 Fla. 225 (67 So. 877) *Fireman's Fund Ins. Co.* v. *Craven*, 134 So. 232 (Fla.)

All the oral discussions were for the purpose of preparing a written instrument, which was intended to embody the contract. It is generally accepted law as laid down by this Court and other Courts that even a contract which would be effective by a parol agreement if so intended would not be effective as a contract if it was intended that the contract would be in writing, until the written agreement was executed. See *Ambler* v. *Whipple*, 20 Wall. 546, 22 Law Ed. 403; *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Co.*, 20 F. (2d) 67; *Murrel* v. *American Railway Express Co.*, 269 S. W. 293 (Ky.) and *Roxton* v. *Armstrong*, 155 So. 755 (Florida).

Under this rule of law, under the facts in this case, there was no contract either oral or written, and the conclusion of the Tax Court that there was an oral contract made by or in behalf of the Corporation was an error of law.

In any event however it is undisputed that all negotiations and the pending deal for the sale by the Corporation were called off. The Corporation definitely decided not to sell. Whatever the reason for this action it is not disputed that this action was taken and the proposed purchaser was duly notified. This proposed contract was therefore not carried out by or in behalf of the Corporation.

When the Corporation was liquidated and its property distributed to the stockholders there was then no contract

for its sale of any kind either oral or written. It was not oral because the action of the parties was conclusive that they intended to be bound only by a written contract and in the second place, as properly decided by the Circuit Court of Appeals there could be no valid oral contract for the sale of realty in Florida.

It thus appears that the two fundamental conclusions or inference of the Tax Court on which it based its conclusion and decision that the liquidation of the Corporation and the sale of its property by the stockholders was a sham and did not represent what actually occurred, are not based on substantial evidence and are contrary to law and thus the decision is contrary to law.

There was no agreement binding the property subject to which the Millers took title. This was found by the Court below. This being true they were free to make any bargain they saw fit. They were free to accept the terms previously discussed with the prospective purchaser and any sale made by them would be their own sale. Either party was free to make any other terms if they had so desired. The Court below well said:

> "As we see it, the controlling fact is that there was no binding agreement to sell made by the Corporation and even the oral agreement was called off. The Millers wished to sell the property and realized their gain. It could lawfully be done in either of two ways: (1) The corporation could sell and distribute the gain; or (2) the corporation could liquidate, transfer the property to its stockholders, and they could sell."

II.

Established Principles Governing Scope of Appellate Review of Tax Court Decisions.

The Commissioner in his brief relies heavily on the decisions of this Court in the case of *Dobson* v. *Commissioner*, 320 U. S. 489 and *Commissioner* v. *Scottish American Investment Co.*, decided December 4, 1944. 65 S. Ct. 169.

Those cases are not authority for the finality of the decision of the Tax Court and do not under the facts of this case limit the judicial review of the decision of the Tax Court. In the *Dobson* case the Court said:

> "Its decision, of course, must have 'warrant in the record' and a reasonable basis in the law. But the 'judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' "

In the case of *Commissioner* v. *Scottish American Investment Co.*, the Court said:

> "And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence. The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court.
>
> "If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings."

It is submitted that in the case at bar there was no warrant in the record and no reasonable basis in the law for the Tax Court decision and the Court below found that there was no rational basis for the conclusions of the Tax Court. It ably pointed out the fallacy of the conclusions and inferences drawn by that Court.

The heart of the Court's decision in the Scottish American Investment Co. above is that the Appellate Court review of a Tax Court decision is limited to a determination of whether there is substantial basis in the evidence for the decision of the Tax Court. It is respectfully submitted that this limitation was given full effect by the Circuit Court

of Appeals. There was no substantial basis for the decision of the Tax Court and it was contrary to law. The Circuit Court of Appeals has the right and duty to review the decision of the Tax Court and to correct the error of law and correct the factual inferences and conclusions of that Court which had no substantial basis in the evidence or in the law.

The attention of the Court is respectfully called to the fact that all the conclusions and inferences on which the Tax Court relied to find that this transaction whereby the Corporation was liquidated, its property conveyed to the stockholders and sold by them to the purchaser in this case was a mere sham and/or device to cover the real transaction; which it designated as a sale by the Corporation were outside of and not included in its "Findings of Fact". The Tax Court did not designate those inferences and conclusions as facts—and none of the facts found by the Tax Court as facts warrant any such inferences or conclusions.

Was the Liquidation by the Corporation and the Sale by the Stockholders a Mere Sham or Form Gone Through to Cover Up a Sale by the Corporation?

It was so held by the Tax Court but it is respectfully submitted that there is no substantial evidentiary basis for this holding. The Corporation had a right to liquidate and it did liquidate its assets and distributed them to its stockholders who made the sale. It had been in contemplation for more than a year but for the reason of contractual obligations of Louis Miller it was not practicable to liquidate until those obligations had been adjusted. When it was liquidated there was no outstanding contract or obligation entered into by or in behalf of the Corporation to sell the property as above stated. The discussions or plans to sell the property had been called off.

When the stockholders acquired the property they were free to do with it as they saw fit. In view of the facts the cases cited by the Commissioner in his brief holding

that tax consequences flow from the substances and not the form in which it is cast have no application. The cases of *Gregory* v. *Helvering and Minnesota Tea Co.* v. *Helvering* cited by the Commissioner have no bearing on this case. There is no substantial evidence for a finding that the transaction was other than what it purported to be, notwithstanding in a proper case such rule of law might be recognized and applied by this Court. There is nothing in this record to indicate that the transactions of liquidation and sale by stockholders was not bona fide.

Would it be reasonable on any substantial basis for the stockholders to act in behalf of the Corporation and make a sale of the property to which they had the legal title when the Corporation was clearly not bound to make such sale by a binding contract previously made? To state the question is to answer it.

It is argued that there was no business purpose in liquidating the Corporation that the property was not received by the stockholders to hold or use as their own, and from this argument the further argument is made that the stockholders were a mere conduit through which the Corporation passed title to the purchaser.

There is no substance to this argument and no substantial evidentiary facts on which it can be based. Obviously when stockholders receive property in liquidation of a Corporation, they have the free choice to sell, to hold or to use as they see fit, unless they are bound by a contract previously made. In this case there was no such contract and the stockholders as held by the Court below were free to sell.

The statement is made in the brief for the Commissioner that it has been uniformly held that where a Corporation in the course of liquidation transfers its property to a trustee or agent for its stockholders who thereafter sells the property, the sale is attributable to the corporation. Several cases are cited as authority. These cases do not support the proposition of law as stated in the brief. In

the case of *Hellenbush* v. *Commissioner*, 65 Fed. (2) 902 the Blackburn Varnish Co. through its officers had closed a deal whereby it would sell its assets to the Cook Co. To consummate the transaction the Corporation went through the form of dissolving the Corporation, appointing trustees for the stockholders, conveying the assets to the trustees and on the same day the sale was made in accordance with the agreement entered into by the Blackburn Co.

This case is obviously not authority to support the decision in the case at bar for here there was no such contract entered into, and none was in existence when the stockholders received the property.

In the other cases cited there was a binding agreement entered into which was carried out by stockholders. The only principle established by the cases cited by the Commissioner in his brief is that when there was a binding contract entered into by a Corporation and the corporation liquidates its property and conveys it to its stockholders who make the sale, that the sale will be considered as if made by the corporation. None of those cases go so far as to hold that there there was no binding contract when a corporation distributed its property to stockholders who sell, that the tax resulting will be imposed on the corporation.

The case of *Com.* v. *Falcon Co.*, 127, F. (2) 277 decided by the Court below is only the embodiment of the same principle as laid down by that Court in reversing the Tax Court in this case. The Court upheld and affirmed the Tax Court because it followed correct principles of law and there was substantial basis for the findings of the Tax Court and reversed the case at bar for the opposite reasons.

In the case of *Trippet* v. *Com.*, 118 Fed. (2) 764 the facts were that the corporation was not legally dissolved. The assets were turned over to two directors of the corporation, who had previously agreed on the terms of sale to an oil company. The Court held that those directors had no right to deal with the corporation property as their

own. The corporation had not been distributed in liquidation, but that they could legally act only as agents for the corporation.

The case of *Taylor Oil and Gas Co.* v. *Commissioner*, 47 Fed. (2) 108 is clearly not contrary to the view advocated by the taxpayer. That is another case relied on by the Commissioner to support his view.

In view of the evidence in this case and the lack of substantial evidence to support the Tax Court inferences, conclusions and decision on the facts and law the Court below properly reversed the decision of the Tax Court.

CONCLUSION.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 581.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* Court Holding Company, a Florida Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 12, 1945.]

Justice Black delivered the opinion of the Court.

An apartment house, which was the sole asset of the respondent corporation, was transferred in the form of a liquidating dividend to the corporation's two shareholders. They in turn formally conveyed it to a purchaser who had originally negotiated for the purchase from the corporation. The question is whether the Circuit Court of Appeals properly reversed[1] the Tax Court's conclusion[2] that the corporation was taxable under Section 22 of the Internal Revenue Code[3] for the gain which accrued from the sale. The answer depends upon whether the findings of the Tax Court that the whole transaction showed a sale by the corporation rather than by the stockholders were final and binding upon the Circuit Court of Appeals.

It is unnecessary to set out in detail the evidence introduced before the Tax Court or its findings. Despite conflicting evidence, the following findings of the Tax Court are supported by the record:

The respondent corporation was organized in 1934 solely to buy and hold the apartment building which was the only property ever owned by it. All of its outstanding stock was owned by Minnie Miller and her husband. Between October 1, 1939 and

[1] 143 F. 2d 823.

[2] 2 T. C. 531.

[3] Profits from the sale of property are taxable as income under Section 22(a) of the Internal Revenue Code, 26 U. S. C. 22. The Treasury Regulations have long provided that gains accruing from the sales of a corporation's assets, in whole or in part, constitute income to it, but that a corporation realizes no taxable gain by a mere distribution of its assets in kind, in partial or in complete liquidation, however much they may have appreciated in value since acquisition. Secs. 19.22(a)-19, 19.22(a)-21, Treasury Regulations 103.

February, 1940, while the corporation still had legal title to the property, negotiations for its sale took place. These negotiations were between the corporation and the lessees of the property, together with a sister and brother-in-law. An oral agreement was reached as to the terms and conditions of sale, and on February 22, 1940, the parties met to reduce the agreement to writing. The purchaser was then advised by the corporation's attorney that the sale could not be consummated because it would result in the imposition of a large income tax on the corporation. The next day, the corporation declared a "liquidating dividend", which involved complete liquidation of its assets, and surrender of all outstanding stock. Mrs. Miller and her husband surrendered their stock, and the building was deeded to them. A sale contract was then drawn, naming the Millers individually as vendors, and the lessees' sister as vendee, which embodied substantially the same terms and conditions previously agreed upon. One thousand dollars, which a month and a half earlier had been paid to the corporation by the lessees, was applied in part payment of the purchase price. Three days later, the property was conveyed to the lessees' sister.

The Tax Court concluded from these facts that, despite the declaration of a "liquidating dividend" followed by the transfers of legal title, the corporation had not abandoned the sales negotiations; that these were mere formalities designed to make the transaction appear to be other than what it was", and thus avoid tax liability. The Circuit Court of Appeals drawing different inferences from the record, held that the corporation had "called off" the sale, and treated the stockholders' sale as unrelated to the prior negotiations.

There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts. *Dobson* v. *Commissioner*, 320 U. S. 489; *Commissioner* v. *Heininger*, 320 U. S. 467; *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119. On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation. The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is

relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.[4] To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

It is urged that respondent corporation never executed a written agreement, and that an oral agreement to sell land cannot be enforced in Florida because of the Statute of Frauds, Comp. Gen. Laws of Florida, 1927, vol. 3, Sec. 5779. But the fact that respondent corporation itself never executed a written contract is unimportant, since the Tax Court found from the facts of the entire transaction that the executed sale was in substance the sale of the corporation. The decision of the Circuit Court of Appeals is reversed, and that of the Tax Court affirmed.

It is so ordered.

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[4] Gregory *v.* Helvering, 293 U. S. 465; Minnesota Tea Co. *v.* Helvering, 302 U. S. 609; Griffiths *v.* Commissioner, 308 U. S. 355; Higgins *v.* Smith, 308 U. S. 473.